# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Juniper v Roberts* [2007] QSC 379 |
| PARTIES: | **SCOTT CHRISTIAN JUNIPER**<br>(applicant)<br>v<br>**JOHN HARRIS ROBERTS AND NGARIE JEAN ROBERTS**<br>(respondent) |
| FILE NO/S: | 8353/06 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court, Brisbane |
| DELIVERED ON: | 6 December 2007 |
| DELIVERED AT: | Supreme Court, Brisbane |
| HEARING DATE: | 19 July 2007 |
| JUDGE: | Douglas J |
| ORDER: | **1. DECLARE THAT THE RESPONDENTS FAILED TO COMPLY WITH SECTION 366(1) OF THE *PROPERTY AGENTS AND MOTOR DEALERS ACT* 2000 BY FAILING TO ATTACH A WARNING STATEMENT AS ITS FIRST OR TOP SHEET TO THE CONTRACT IN RELATION TO THE APPLICANT'S PURCHASE FROM THE RESPONDENTS OF LOT 16 ON CP AM83312, COUNTY OF CANNING, PARISH OF MOOLOOLAH, TITLE REFERENCE 14724012 ("THE CONTRACT").**<br><br>**2. DECLARE THAT THE APPLICANT HAS LAWFULLY TERMINATED THE CONTRACT PURSUANT TO SECTION 367(2) OF THE *PROPERTY AGENTS AND MOTOR DEALERS ACT 2000.***<br><br>**3. ORDER THAT THERE BE JUDGMENT IN FAVOUR OF THE APPLICANT AGAINST THE RESPONDENTS IN THE AMOUNT OF $242,413.64.**<br><br>**FURTHER SUBMISSIONS SOUGHT AS TO COSTS** |
| CATCHWORDS: | CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER - BREACH OF CONTRACT – BREACH BY THE VENDOR: REMEDIES OF PURCHASER – GENERAL - where respondent in failing to attached a warning statement to a faxed sale contract breached s366(1) of the Property Agents and Motor Dealers Act 2000 – where the purchaser as a result has lawfully terminated the contract |

pursuant to s367(2) the Property Agents and Motor Dealers Act 2000.

CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – MATTERS ARISING BETWEEN CONTRACT AND CONVEYANCE – WAIVER OF CONDITIONS - whether the applicant by proceeding with the contract waived his right to terminate the contract or elected not to exercise that right.

ESTOPPEL – ESTOPPEL IN PAIS – THE REPRESENTATION – BY CONDUCT – CONVEYANCING CASES - where alleged conduct by the purchaser in performing work on the property, leasing or advertising sale of the property does not prevent him from exercising his statutory right to terminate under s367(2) of the Property Agents And Motor Dealers Act 2000.

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – CROSS-CLAIMS: SET-OFF AND CONTERCLAIM – SET-OFF – WHAT MAY BE SET-OFF – DISTINCTION BETWEEN SET-OFF AND COUNTERCLAIM – where respondents had a claim for unliquidated damages against the purchaser for damage to the property – where such counterclaim is not one properly treated as a set off – where such claim may be part of a separate proceeding – where such claim does not prevent relief for the buyer under s 367(4) of the Property Agents and Motor Dealers Act 2000.

*Property Agents and Motor Dealers Act* 2000, s366(1), s366(3), s367(2)

*Blackman v Milne* [2006] QSC 350, distinguished
*Eversure Textiles Manufacturing Co Ltd v Webb* [1978] Qd R 347, cited
*James v Commonwealth Bank of Australia* (1992) 37 FCR 445, cited
*Johnston v Jewry* [2007] QCA 188, applied
*McDonnell & East Ltd v McGregor* (1936) 56 CLR 50, applied
*MNM Developers Pty Ltd v Gerrard* [2005] 1 Qd R 515, applied
*MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320, cited
*Re K L Tractors* [1954] VLR 505, cited
*South Esplanade Developments Pty Ltd v Astill* [2007] SADC 24, cited

COUNSEL: S L Doyle SC with D G Clothier for the applicant
J A Griffin QC with P J Woods for the respondents

SOLICITORS: Thompson McNichol for the applicant
J Hall Lawyers for the respondents

[1] **Douglas J**: This is an application for a declaration that the applicant lawfully terminated a contract for the sale of land because of the respondents' breach of s. 366 of the *Property Agents and Motor Dealers Act* 2000, the provision that requires warning statements to be attached to relevant contracts for the purchase of residential property under that Act. Associated relief, including the refund of the deposit paid and the payment of the applicant's reasonable legal and other expenses incurred in relation to the contract, is also sought.

**Background facts**

[2] Mr Juniper, the applicant, offered to purchase a residential property from Mr and Mrs Roberts on 27 May 2004. The respondents accepted that offer by a facsimile sent to his solicitors on 28 May 2004. The contract was not due to settle for two years and entitled Mr Juniper to take possession on payment of the initial deposit and acceptance of title. He moved into possession on about 4 June 2004 and accepted title on 13 June 2004. While in possession he leased the property to other people and is said to have carried out renovation work, removed some fixtures and fittings and not to have maintained the property properly. He also advertised it for sale but, presumably, did not obtain the price he wanted.

[3] Towards the end of his two year tenure of the land and shortly before settlement was due, he gave notice of termination of the contract by facsimile dated 9 May 2006. The ground for termination of the contract advanced by him was its failure to conform with s. 366 of the *Property Agents and Motor Dealers Act* 2000. That section then required a contract to have attached as its first or top sheet a warning statement containing information mentioned in s. 366(3). If a warning statement was not attached to the contract the buyer might terminate it "at any time before the contract settles" by notice of termination under s. 367(2).

[4] The contract was prepared by Mr and Mrs Roberts' real estate agent as a number of draft contracts sent to Mr Juniper by facsimile. Each facsimile had a cover sheet as its first page, followed by the warning statement, and was received by Mr Juniper as separate unattached pages. The special conditions were sent late in the day on 27 May 2004 as one page that was sent individually, apparently without a cover sheet and without a warning statement. The contract signed by Mr Juniper was compiled from the various facsimiles sent to him, signed by him and then faxed to the agent who witnessed his signature, but not in his presence. The respondents then signed the faxed contract bearing Mr Juniper's faxed signature and it was then sent back, again by facsimile, to Mr Juniper's solicitors.

[5] The respondents allege that the agent sent Mr Juniper by mail a further original copy of the contract to be executed and returned by him. That evidence is disputed but it is common ground that Mr Juniper did not sign and return any further copy.

[6] The contract contained a special condition, cl. 6. It read:

> "Execution by Facsimile
>
> The Seller and the Buyer separately acknowledge that this Contract of Sale is being signed on a facsimile of the Contract and accordingly

> that the Seller and the Buyer separately shall be bound by all terms and conditions contained in the Contract upon signing of the facsimile by them, and further that they shall sign the original Contract immediately upon receipt."

**Discussion – breach of the Act**

[7] In *MNM Developers Pty Ltd v Gerrard* [2005] 1 Qd R 515 the Court of Appeal, by de Jersey CJ and Williams JA, took the view that the ordinary meaning of the word "attached" required some physical joinder or incorporation of the warning statement to the relevant contract; see de Jersey CJ at 519-520, [18]-[19] and Williams JA at 523 [44]-[45]. In that case the relevant documents had been sent by a continuous facsimile and the view expressed was that that did not have the result that the warning statement was attached as the first or top sheet of the contract. That factual conclusion is clearer here also as the facsimile was received and sent as separate sheets. Their Honours said in passing that the statutory regime then in force and applicable to this case also, while allowing negotiation by facsimile, required the act of contracting to be effected by the exchange of the original documents. Those conclusions were not strictly necessary for the decision reached in the case because the evidence did not address the configuration of the concluded contract pleaded; see de Jersey CJ at 518, [9], Williams JA at 522-523, [41]-[46] and McMurdo J at 523, [50]. I am, of course, obliged to take them into account as considered expressions of opinion about the proper interpretation of these provisions of the Act.

[8] On the facts established here, it seems clear that there was a concluded agreement when the respondents signed the faxed contract and returned it by facsimile, thus communicating their acceptance. The evidence is that, after the respondents signed the contract, loose pages were sent by facsimile to Mr Juniper's solicitors. The evidence does not address the issue whether the warning statement was attached when the contract was signed by the respondents but it was not in issue that the communication of that acceptance was sent as loose facsimile pages. Thus, at no time, either when Mr Juniper received the various proposed contracts or signed his compilation of documents or when the agreement was concluded by the respondents' communicating their acceptance of it was the warning statement attached; see McMurdo J in *MNM Developments Pty Ltd v Gerrard* at 524, [54]-[56].

[9] The view expressed by White J, with whom Jerrard JA and Atkinson J agreed, in *Johnston v Jewry* [2007] QCA 188 at [33]-[34] was, in any event, that the Act should be construed to require the buyer to be exposed to the attached warning statement before signing the contract. As her Honour said:

> "[33] I have concluded that a construction which favours a buyer being exposed to the warning statement prior to signing the contract advances the purpose of consumer protection more effectively than one which requires the warning statement to be drawn to the buyer's attention after the buyer is bound by the contract, even though the cooling-off period only commences from the time the contract is returned to the buyer or the buyer's agent under s 365(1). This is because it is virtually certain that the buyer will be present to sign the contract (unless the buyer employs an agent) on the first occasion but in many, if not most cases, will not be when the

> executed contract is received from the seller usually by the buyer's solicitor. In other words, I prefer the construction of the Act which was advanced by Williams JA in *Gerrard* at the paragraphs which have already been quoted. It follows that such a construction, namely that "contract" in s 366(1) must be read as "proposed contract" would not require the warning statement to be the first or top document when the contract is received from the seller as contended for by the appellant."

[10] On any of the possible approaches to the construction of the provision identified by McMurdo J in *MNM Developments Pty Ltd v Gerrard* and the Court of Appeal in *Johnston v Jewry* there was no attachment of the warning statement as the first or top sheet of the relevant contract or "proposed contract". First there was no attachment; secondly any statement was arguably not the top sheet as it was preceded by a facsimile cover sheet and thirdly, because Mr Juniper was left to compile the final version himself, at no stage was he presented with a final draft of the contract complete with a warning statement. Accordingly there is a prima facie case of breach of s. 366 entitling the applicant to terminate at any time before settlement and receive a refund of his deposit and the payment of his reasonable legal and other expenses incurred in relation to the contract after he signed it.

**Possible defences**

***Breach of special condition 6 of the contract***

[11] The respondents resist this relief on four bases. Their first argument is that Mr Juniper has acted in breach of special condition 6 by not signing the original contract sent to him. That may be the case, especially if it could be established that Mr Juniper received that original document, something he denies, but it does not address the issue whether the respondents have complied with s. 366 when the contract intended to be formed by the exchange of facsimiles was formed. As Mr Doyle SC for Mr Juniper submitted, the argument was circular because the only contract in existence was one which failed to comply with s. 366 which Mr Juniper had a statutory right to terminate and which he has exercised.

***Waiver or election***

[12] The next argument is that Mr Juniper waived his right to terminate the contract or elected not to exercise that right by proceeding with the contract. In this context Mr Doyle SC relied upon the following passage from the decision of Muir J in *MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320 at [45]-[47]:

> "[45] Waiver, insofar as it is a sustainable principle independent of estoppel, in this context at least, applies only where there are alternative rights inconsistent with one another and a party acts, with knowledge of the facts giving rise to the law applicable to the rights, in a manner consistent only with his having chosen to rely on one of them.
>
> [46] Returning to the question for determination, there is no inconsistency between acknowledging the existence of the contract and taking a step under or in reliance on it on the

> one hand and the maintenance of the right to terminate conferred by s 367(2), on the other. That provision gives a buyer the right to terminate 'the contract at any time before the contract settles', irrespective of the nature and extent of the performance under the contract and irrespective of the party's conduct by reference to it. Consequently, failure to exercise the right of termination of a contract, even with full knowledge of the right to terminate, is not necessarily inconsistent with acts which acknowledge the continued existence of the contract.
>
> [47] As Brennan J expressed it in *Verwayen* -
>
> > 'As a right is waived only when the time comes for its exercise and the party for whose sole benefit it has been introduced knowingly abstains from exercising it, a mere intention not to exercise a right is not immediately effective to divest or sterilise it.'"

[13] Because s. 367(2) provides a right to terminate at any time before the contract settles it also seems to me that it is correct to say that there is no occasion to elect between alternative rights in this case. In proceeding with the contract until close to the time for settlement, Mr Juniper did not elect to forego the statutory right to terminate at any time before settlement. Accordingly, there is no occasion to apply the doctrines of waiver or election.

***Estoppel***

[14] The next argument made by Mr Griffin QC for the respondents was that Mr Juniper was estopped by his conduct from now contending that he could rely upon his right to terminate under s. 367(2). None of the conduct alleged against him in performing work on the property, leasing it or advertising it for sale amounted to a representation that he would not rely upon his statutory right to terminate. I recognised in *Blackman v Milne* [2006] QSC 350 that it was open to a buyer to waive a breach of this legislation by a seller on the basis that s. 365(2)(c)(ii) of this Act was a right created for a buyer's private benefit; see at [20]. It is, in my view, a long step to take from that conclusion to one preventing a buyer relying upon his statutory rights under s. 366 and s. 367 when he has not waived the sellers' breach nor made any representation that he would not rely upon his statutory rights. As was submitted for Mr Juniper, he had a right to terminate at any time before settlement and a decision to proceed with the contract at some earlier time cannot in itself amount to a representation that the right to terminate later would never be exercised. It was also argued that no detrimental reliance by Mr and Mrs Roberts was established because it was necessary for them to understand that Mr Juniper's conduct involved a representation that he would not exercise his right to terminate under s. 367 at any time up to settlement and there was no such evidence.

[15] The respondents relied upon a decision of the South Australian District Court in *South Esplanade Developments Pty Ltd v Astill* [2007] SADC 24. In that case, his Honour, Judge Millsteed, considered whether the statutory cooling off right allowed to the buyer of land referred to in the legislation under consideration was subject to the principles of waiver, election, affirmation, estoppel and laches. He was concerned that failure to recognise the application of such doctrines would lead to

possible circumstances in which an unscrupulous buyer could convert the right to cool off into an instrument of commercial oppression; see at [75]. In reaching that conclusion he decided that the matter should go to trial rather than be dealt with as a summary judgment application.

[16] Given the facts of this case, one can understand his Honour's concerns, but it seems to me that the legislature has taken the definite stance of giving a buyer the right to terminate for a relevant breach which is exercisable at any time before the contract settles. It may well have been preferable for the legislation to impose a time limitation on the exercise of that right to terminate, particularly where a buyer has affirmed the contract knowing of his or her rights. Parliament has chosen not to do that, however, but to express itself in uncompromising terms.

[17] Because of this South Australian decision I was invited by Mr Griffin QC not to determine this application at this stage but to send it to trial. This was not a summary judgment application but an application for a declaration. There were no relevant disputed facts between the parties and no other reason why I should avoid determining the question now. In my view the respondents have not pointed to conduct by Mr Juniper that prevents him from now relying on his statutory rights.

***Counterclaim for damages***

[18] The final argument advanced by the respondents was that they had a claim for unliquidated damages against Mr Juniper for damage to the property, his failure to maintain it, the removal of fixtures and fittings and further costs. The damages are said to total $484,788.45. The respondents have provided instructions to their solicitors to make a claim against the applicant for that amount.

[19] Such a counterclaim is not one properly treated as a set-off, as Dixon J said in *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50, 62:

> "My opinion is that a liquidated cross-demand cannot be pleaded as an answer in whole or in part to a cause of action sounding in damages or vice versa. Such cross-demands must be pleaded by way of counterclaim, not set-off."

[20] See also Gummow J in *James v Commonwealth Bank of Australia* (1992) 37 FCR 445, 457-458 and *Eversure Textiles Manufacturing Co Ltd v Webb* [1978] Qd R 347, 348-349 per Connolly J and *Re K L Tractors* [1954] VLR 505, 507-508 per O'Bryan J.

[21] These counterclaims do not impeach Mr Juniper's title to his statutory claims. Mr and Mrs Roberts may sue for those damages in separate proceedings but it does not seem to me that those rights available to them provide a reason why I should hold my hand in respect of the statutory relief available to a buyer under s. 367(4) for a refund of the deposit and, by s. 367(6), for the reasonable legal and other expenses incurred by him in relation to the contract after he signed. There was no dispute about the amount of money said to be payable in those circumstances.

**Orders**

[22] Accordingly I shall make the following orders:

1. Declare that the respondents failed to comply with section 366(1) of the *Property Agents and Motor Dealers Act* 2000 by failing to attach a warning statement as its first or top sheet to the contract in relation to the applicant's purchase from the respondents of Lot 16 on CP AM83312, County of Canning, Parish of Mooloolah, Title Reference 14724012 ("the Contract").

2. Declare that the applicant has lawfully terminated the contract pursuant to section 367(2) of the *Property Agents and Motor Dealers Act 2000.*

3. Order that there be judgment in favour of the applicant against the respondents in the amount of $242,413.64.

[23] I shall hear further submissions as to costs.