

SUPREME COURT OF QUEENSLAND

CITATION: *Scali Properties Pty Ltd v Crittenden & Anor* [2009] QSC 290

PARTIES: **SCALI PROPERTIES PTY LTD AS TRUSTEE FOR THE SCALI PROPERTIES UNIT TRUST**
(applicant)
v
ROBERT JOHN CRITTENDEN and SUZANNE LYNETTE CRITTENDEN

FILE NO/S: BS 9488 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 9 September 2009

JUDGE: Chief Justice

ORDER: **There will be declarations:**

- 1. That the contract of sale between the respondents and the applicant for the sale of the property at 1/32 Sunset Boulevard, Surfers Paradise, lot 1 on BUP 101831, County of Ward, Parish of Gilston, remains on foot.**
- 2. That the contract of sale between the respondents and the applicant for the sale of the property at 2/32 Sunset Boulevard, Surfers Paradise, lot 2 on BUP 101831, County of Ward, Parish of Gilston, remains on foot.**

There will also be an order:

- 3. That the respondents pay the applicant's cost of and incidental to the proceeding, to be assessed on the standard basis. I reserve liberty to apply in writing within seven days should a different costs order be sought.**

CATCHWORDS: CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – VENDOR'S REMEDIES – RESCISSION OR TERMINATION – LOSS OF RIGHT – contracts for sale of land – accrual of right to terminate –

whether right waived

Sargent v ASL Developments Ltd (1974) 131 CLR 634, cited
Tropical Traders Ltd v Goonan 111 CLR 41, cited

COUNSEL: C D Coulsen for the applicant
C C Wilson for the respondent

SOLICITORS: Winchester Young and Maddern for the applicant
Rowe Lawyers for the respondent

[1] The respondents, Mr and Mrs Crittenden, entered into two separate contracts to sell home units to the applicant Scali. The contracts were dated 27 May 2009. The issue is whether the contracts have been terminated, or remain on foot. Scali seeks declarations that they remain on foot, and decrees for specific performance. Because Mr and Mrs Crittenden raise a factual issue about Scali's financial capacity to complete, any relief should be confined to declarations.

[2] Each contract contained the following cl 3:

“3 Finance

- 3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.
- 3.2 The Buyer must give notice to the Seller that:
- (1) approval has not been obtained by the Finance Date and the contract is terminated; or
 - (2) the finance condition has been either satisfied or waived by the Buyer.
- 3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.
- 3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to terminate this contract under clause 3.2(1) or waive the benefit of this clause 3 by giving written notice to the Seller of the waiver.”

[3] The “Finance Date” was 17 June 2009. Scali failed to give the notice required by cl 3.2. Consequently, at 5 pm on 17 June 2009, Mr and Mrs Crittenden gained a right to terminate the contracts by notice to Scali.

[4] The evidence shows the following exchange of correspondence after 17 June 2009:

1. On 26 June 2009, the solicitor for Scali wrote to the solicitors for Mr and

Mrs Crittenden saying:

“We confirm that we are holding the deposit funds of \$170,000 in respect of both contracts.

Mrs Crittenden has been contacting our office and requesting the release of the deposit.

We have taken instructions from Mr Scali and while at some point during the many negotiations between our respective clients there was some talk about the early release of the deposit, as you will be able to advise your client the contracts do not make provision for early release of the deposit, and Mr Scali has instructed that he is not prepared to authorise its early release.”

2. On 29 June 2009, the solicitors for Mr and Mrs Crittenden wrote to the solicitor for Scali saying:

“We confirm that our client is agreeable to an extension of the settlement date until 31 August 2009, with time to remain of the essence for both contracts above on the provision that your client releases the deposit monies of \$170,000 (in total) to our client immediately.”

3. On 30 June 2009, the solicitor for Scali wrote to the solicitors for Mr and Mrs Crittenden saying:

“Our client has not contacted us as yet with the instructions as per your correspondence however we will contact him today.

Part of the problem in this matter is that the clients continue to discuss matters amongst themselves and it would be better for all concerned if they directed their instructions through our respective selves.”

4. On the same day, the solicitor for Scali wrote again as follows:

“Mrs Crittenden has requested that the deposit be released unconditionally. That did not form part of the terms of the contract.

If Mr Scali is to release the deposit unconditionally he has advised that it be on the following terms:

1. That the settlement date be extended to 31 August 2009.
2. That the contract value for each of the properties be amended to \$1 million.”

5. On the same day, the solicitors for Mr and Mrs Crittenden wrote:

“Our clients are unable to change the contract values for either properties as changes to the values will have serious capital gains tax implications for our clients. They are only prepared to extend the settlement date until 31 August 2009, with time to remain of the essence if the full deposit is released to our clients unconditionally immediately.”

6. On 2 July 2009, the solicitor for Scali wrote:

“Our instructions are not to extend settlement nor to release the deposit to your clients.

Transfer documents will be forwarded to you for your client’s execution today.”

7. On the same day, the solicitors for Mr and Mrs Crittenden wrote:

“Can you please advise urgently whether your client has obtained finance for the above properties and that the contract is unconditional? Finance was due on 17 June 2009.”

8. Also on 2 July 2009, the solicitors for Mr and Mrs Crittenden wrote:

“We confirm that our clients have elected to terminate both the contracts above under the Finance Clause for your client’s failure to advise of your client’s finance approval by the finance date in the contract.

We authorise you to release the deposit monies to your client.”

9. Also on 2 July, the solicitor for Scali wrote:

“My client has not advised that he has agreed to terminate the contracts.

In addition, there is no positive obligation under the contracts for our client to advise in relation to finance. Our client is only entitled to rely on the Finance Clause in the event that finance is not available.

As far as I am concerned, the contracts remain on foot, with settlement and vacant possession to be given on 13 July 2009.”

- [5] As mentioned, when Scali failed to give notice under cl 3.2 by 5 pm on 17 June 2009, Mr and Mrs Crittenden gained a right to terminate the contracts by notice to Scali. Mr and Mrs Crittenden did not purport to exercise that right until by fax of 2 July, referred to in para 8 above. But by then, Mr and Mrs Crittenden had waived that right of termination or elected to affirm the contracts.
- [6] That emerges from the letters from their solicitors of 29 June 2009 (para 2 above) and 30 June 2009 (para 5 above).
- [7] In those letters, the solicitors for Mr and Mrs Crittenden were proceeding as if the contracts were on foot, contemplating an extension of time for settlement on certain conditions. The terms of the letters involved an acknowledgement that time was then “of the essence”. (The then current date for completion was 13 July 2009.)
- [8] The solicitors for Mr and Mrs Crittenden did not in those letters reserve the Crittendens’ right to terminate, or say that the further negotiation was “subject to” or “without prejudice to” that right to terminate. In that regard see *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 53, 55, 61.
- [9] The communications evidence Mr and Mrs Crittenden’s clear and unequivocal intention to proceed to completion: they are consistent only with the Crittendens maintaining or affirming the contracts. See *Sargent v ASL Developments Ltd* (1974)

131 CLR 634, 641-6, 655-6. It follows that they could not terminate on 2 July as they purported to do.

[10] Separately, Mr Coulsen submitted, for Scali, that by the letter of 2 July 2009 (para 4.6 above), in saying: “Transfer documents will be forwarded to your client’s execution today”, Scali waived the benefit of the finance condition. It is not necessary for me to determine that point, but it would have to confront an argument that cl 3.2 contemplates notice of express waiver, in terms that is, and not a waiver to be inferred from conduct (see also cl 3.4).

[11] On the undisputed facts established by the evidence before me, the contracts remain on foot and enforceable.

[12] There will be declarations:

1. that the contract of sale between the respondents and the applicant for the sale of the property at 1/32 Sunset Boulevard, Surfers Paradise, lot 1 on BUP 101831, County of Ward, Parish of Gilston, remains on foot;
2. that the contract of sale between the respondents and the applicant for the sale of the property at 2/32 Sunset Boulevard, Surfers Paradise, lot 2 on BUP 101831, County of Ward, Parish of Gilston, remains on foot.

[13] There will also be an order that the respondents pay the applicant’s cost of and incidental to the proceeding, to be assessed on the standard basis. I reserve liberty to apply in writing within seven days should a different costs order be sought.