SUPREME COURT OF QUEENSLAND

CITATION:	*RPA Properties P/L v Robina Syndicate P/L* [2009] QSC 339
PARTIES:	**RPA PROPERTIES PTY LIMITED** ACN 092 407 479 (plaintiff) **v** **ROBINA SYNDICATE PTY LIMITED** ACN 130 830 563 (defendant)
FILE NO/S:	BS 5196 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2009
JUDGE:	McMurdo J
ORDER:	**1. It is declared that the plaintiff has validly forfeited the deposit paid by the defendant.** **2. The counterclaim is dismissed.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the contract provides that there must be "no unsatisfied judgment, order or writ of execution which affects the Land" – where the purchaser may terminate the contract if that statement is inaccurate – where a Supreme Court Judge ordered that an easement affecting the Land be partially extinguished – where the partial extinguishment was registered – whether "unsatisfied" qualifies not only "judgment" but "order or writ of execution" – whether the order "affects the Land" *Land Title Act* 1994 (Qld), s 175 *Property Law Act* 1974 (Qld), s 180, s 181 *Breskvar v Wall* (1971) 126 CLR 376, cited *Liverpool Holdings Limited v Gordon Lynton Car Sales Pty Ltd* [1979] Qd R 103, cited *Moller v Roy* (1975) 132 CLR 622, applied

Re Southern Cross Airlines Holdings Ltd (in liq) [2000] 1 Qd R 84, applied

The Queen v Ireland (1970) 126 CLR 321, applied

COUNSEL: R G Bain QC for the plaintiff
G D Beacham for the defendant

SOLICITORS: Shand Taylor for the plaintiff
Mallesons Stephen Jaques for the defendant

[1] The parties made a contract for the sale by the plaintiff to the defendant of land at Robina. As the contract recorded, there was then an easement registered in favour of the land. However, between the date of contract and the due date for completion, that easement was partially extinguished and the registered title was amended accordingly. The defendant learnt this when searching the title shortly before the completion date. Upon that basis the defendant purported to terminate the contract.

[2] The question is whether the defendant's termination was valid. The defendant's case relies upon a specific provision of the contract and the debate concerns its proper construction. But before going to that term, it is necessary to say something more about the facts.

[3] The contract was made on 18 August 2008. The price was $8,250,000 and a deposit of five per cent was paid. The land is described as lot 718 on SP106484 and has an area of 6,662m^2. It is bounded to the west and to the south by roads, to the east by the Gold Coast railway line and to the north by Robina train station.

[4] The easement was granted for drainage purposes and was registered in 1916. The area now known as Robina was then farming land. The servient tenement is an area of about 24 hectares and is more than a kilometre to the north of lot 718. In 1916 lot 718 was part of a larger holding. The development of this area has involved several subdivisions and, as mentioned, the construction of roads and a railway. According to unchallenged evidence for the plaintiff, this development, coupled with the topography and other features of the land between lot 718 and the servient tenement, have resulted in the easement being of no benefit to lot 718.

[5] On 4 April 2008, the plaintiff received a letter from solicitors acting for the owners of the servient tenement. They wrote that their clients took the view that there was no benefit from the easement (and another similar easement) and they had applied for orders for extinguishment of the easement under s 181 of the *Property Law Act* 1974 (Qld).

[6] Because the easement was thought to be of no benefit to the plaintiff, it did not contest the application for extinguishment. There were many other owners who were notified of the proceedings but ultimately none of them opposed the application when it came before Douglas J on 24 November 2008. On that day his Honour made orders for the partial extinguishment of the easements in relevantly the following terms: [1]

> "2. Pursuant to section 181(1) of the *Property Law Act* 1974:

[1] Orders made in proceedings 2966/08.

(a) …

(b) Easement Number 601113166 in respect of the areas described as easements M and X on Registered Plan 21884 on Lot 1 on SP 190865 be extinguished.

3. The Registrar of Titles (Department of Natural Resources and Water Land Title Registry):

(a) record the extinguishment of the easements referred to in paragraph (2) of this Order in the Freehold Land Register;

(b) remove the easements referred to in paragraph 2 of this Order from the titles of all lots upon which the easements are registered as encumbrances (whether benefiting or burdening);

(c) dispense with the production of certificates of title for each lot upon which the easements referred to in paragraph 2 of this Order are registered as encumbrances (whether benefiting or burdening); and

(d) dispense with the production of consents from the mortgagees or other interest holders of each lot upon which the easements referred to in paragraph 2 of this Order are registered as encumbrances (whether benefiting or burdening)."

[7] On 27 March 2009 that order was deposited with the registrar. The register thereafter recorded the extinguishment of the easement in accordance with that order. By s 175 of the *Land Title Act* 1994 (Qld), the register was amended from the time of that lodgement. Accordingly, as is common ground, the easement was partially extinguished by the due date for the completion of the contract, which was 3 April 2009.

[8] The defendant became aware of these matters when its solicitors conducted a check search in preparation for settlement. On 3 April 2009, the defendant gave a notice purporting to terminate the contract. Half an hour later, the plaintiff gave a notice purporting to terminate the contract for the defendant's repudiation.

[9] By an arrangement between the parties, the deposit paid under the contract had been released to the plaintiff prior to the date for completion. The plaintiff seeks a declaration as to its entitlement to retain the deposit and the defendant counterclaims to recover it.

[10] The contract of sale referred to this easement although it identified it as "Benefit Easement No 601113166" in the particulars of sale next to the word "Encumbrances". It is common ground that the subject matter of the sale was lot 718 with the benefit of the easement but that, apart from the clause upon which the defendant relies, the partial extinguishment of the easement would not have

entitled the defendant to refuse to complete. That is because the defendant would still be obtaining essentially that for which it bargained because the easement was of no present or potential utility: *Liverpool Holdings Limited v Gordon Lynton Car Sales Pty Ltd*.[2]

[11] The defendant relies upon clauses 6.3 and 6.4 as follows:

> "6.3 The Vendor states that, except as disclosed in this Contract, each of the following statements will be accurate at the Date for Completion:
>
> 6.3.1 there is no current litigation by any person claiming an estate or interest in the Land;
>
> 6.3.2 there is no unsatisfied judgment, order or writ of execution which affects the Land;
>
> 6.3.3 no order has been made under Part 11 of the Property Law Act 1974 which would operate as a charge on the Land;
>
> 6.3.4 there is no order of a Court or other competent authority affecting the ability of the Vendor to complete this Contract;
>
> 6.3.5 no notice has been issued by a competent authority or proceedings instituted in a Court pursuant to any statute whereby the interest of the Vendor in the Land may be rendered liable to forfeiture to the Crown;
>
> 6.3.6 the Vendor is the registered owner of the Land.
>
> 6.4 If a statement contained in either clause 6.2 or clause 6.3 is not accurate then the Purchaser may terminate this Contract by notice in writing to the Vendor."

Clause 6.5 provided that if the contract were so terminated, the deposit would be refunded to the purchaser who would then have no claim against the vendor.

[12] The defendant's case is that as at the date for completion, the order for partial extinguishment of the easement was, in terms of cl 6.3.2, an order which affected the land. It argues that the order was the source of the impact upon the register so that even after registration, the order continued to affect the land.

[13] The plaintiff argues that the order had been satisfied by the date for completion, and that cl 6.3.2 is engaged only where the judgment, order or writ of execution, as the case may be, was "unsatisfied" at the date for completion.

[14] In my conclusion cl 6.3.2 was not engaged, essentially for two reasons. The first is that the ordinary meaning of the clause is that the word "unsatisfied" qualifies not

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2 [1979] Qd R 103.

only the word "judgment" but also "order or writ of execution". The second reason, which perhaps is simply a variant of the first, is that this order, which was satisfied by the registration of the partial extinguishment of the easement, thereafter ceased to "affect" the land. Rather, the land was affected by the state of the register, the title being, of course, the result of the register.[3]

[15] The defendant's argument is that the order was the "source of the removal of the rights that the land had previously enjoyed" and that registration "simply entrenched this effect by giving it the benefit of indefeasibility". As I see the matter, the order required the registration of certain instruments which would affect the title, and the title was affected by the registration. Of course the impact upon this easement can be seen to have been a consequence of the order. But the acceptance of the defendant's argument would be that the parties have agreed that where the state of the register in any respect could be traced historically to an order, then cl 6.3.2 would allow the purchaser to terminate although the order had long been performed. Under this argument, there would be no distinction between an order which affected the register prior to the date of the contract or subsequently. In my view the parties cannot be thought to have intended that the purchaser might terminate because the content of the register could be traced to an order.

[16] The arguments each focussed upon whether "unsatisfied" qualified "order". Much of the defendant's argument seemed to be upon a premise that the categories of "judgment" and "order" are mutually exclusive. So for example, it was said that an unsatisfied judgment which affects the land will be one which burdens the land with the payment of money for the performance of some other obligation, whereas there may be orders which affect land without imposing a burden, such as an order imposing a statutory right of user under s 180 of the *Property Law Act* 1974 (Qld). Curiously, in this submission a declaration, and in particular a declaration about the lawfulness of a particular use of land, was said to be an order which would "affect" land but which could not be aptly described as "unsatisfied".

[17] In *The Queen v Ireland*,[4] Barwick CJ said that "the only judgment given by a court is the order it makes". Referring to that statement, Mason J in *Moller v Roy*[5] said that the word "judgment" had the accepted legal meaning as "the formal order made by a court which disposes of, or deals with, the proceeding then before it". And in *Re Southern Cross Airlines Holdings Ltd (in liq)*,[6] Fitzgerald P referred to "the established proposition that every operative and conclusive judicial act is an order". Thus there is no demarcation between judgments and orders as the defendant's argument suggests. And at least many orders, like many judgments, have an effect which enables them to be described as satisfied or unsatisfied according to the circumstances. I do not accept the argument that it is apt to describe a judgment as satisfied or unsatisfied, but not an order as such. As for a judicial decision in the form of a declaration, I would not accept that it is more an order than a judgment. But apart from that point, a declaration is an illustration of how some judgments (or perhaps orders) cannot be "satisfied", because they have no coercive effect. Thus the judgments or orders which could be within cl 6.3.2 would be those which were in terms for which they could be characterised as satisfied or unsatisfied according to the circumstances.

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3 *Breskvar v Wall* (1971) 126 CLR 376.
4 (1970) 126 CLR 321 at 330.
5 (1975) 132 CLR 622 at 639.
6 [2000] 1 Qd R 84 at 95.

[18] In the context of this contract for the sale of land, there is no evident purpose for the parties to have intended to distinguish between satisfied and unsatisfied judgments, but not between satisfied and unsatisfied orders. Moreover, that distinction would be unworkable. In this case, the order is also properly described as a judgment, and it has been satisfied.

[19] It was further argued that it was inapt to describe a writ of execution as unsatisfied because to affect the land it would have to be unsatisfied. It is said that once a writ of execution is satisfied by the sale of the land in question, it no longer affects the land. But if it is superfluous to describe a writ of execution affecting the land as unsatisfied, that inelegance does not lead to an acceptance of the defendant's argument.

[20] The result is that the defendant's termination was not justified. The plaintiff was then entitled to terminate as it did and to forfeit the deposit. It will be declared that the plaintiff has validly forfeited the deposit paid by the defendant. The counterclaim will be dismissed. I will hear the parties as to costs.