

SUPREME COURT OF QUEENSLAND

CITATION: *McLeay & anor v Caprice Property Holdings Pty Ltd* [2012] QSC 365

PARTIES: **JOHN LEONARD MCLEAY**
(first applicant)
JULIE ANN MCLEAY
(second applicant)
v
CAPRICE PROPERTY HOLDINGS PTY LTD
(respondent)

FILE NO/S: BS 9708 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 23 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 1 November 2012

JUDGE: Martin J

ORDER: **The Court declares that:**

- 1. The agreement dated 28 May 2012 between the applicants as sellers and the respondent as buyer for the sale of land described as Lot 256 on Registered Plan 115368 in the County of Ward, Parish of Nerang, Title Reference 14198022 has been lawfully rescinded by the applicants.**
- 2. The deposit of \$135,000 paid to Lucy Cole Prestige Properties Broadbeach Pty Ltd as trustee of the Gaindrift trust, as stakeholders, has been forfeited to the applicants and that the applicants are entitled to give a good discharge therefor.**

It is ordered that:

- 1. The respondent pay the applicants' costs of and incidental to these proceedings.**

CATCHWORDS: CONVEYANCING – COMPLETION OF CONTRACT – TIME FOR COMPLETION – GENERALLY – where applicants and respondent entered into contract for sale of land – where contract specified settlement to occur between 9am and 5pm on the date of settlement – where applicants

called for settlement at 3pm but release of mortgage had not arrived – where respondent’s representative left settlement area and did not return when requested – whether respondent breached its obligations – whether applicants lawfully rescinded contract

Aussie Invest Corporation Pty Ltd v Pulcesia Pty Ltd (2005) 13 VR 168, applied

Ex parte Robertson [1983] 1 Qd R 526, cited

Jeppesons Road Pty Ltd v Di Domenico & anor [2005] ANZ Conv R 258, cited

Paclyn Pty Ltd v GP Harris Real Estate Pty Ltd (1987) 4 BPR 9267, cited

Re Ronim Pty Ltd [1998] 2 Qd R 172, cited

COUNSEL: G Radcliff for the applicants
A Barlow for the respondent

SOLICITORS: Robinson & Robinson for the applicants
McDonald Balanda & Associates Lawyers for the respondent

- [1] By their Originating Application, the applicants sought specific performance of an agreement for the sale of land. In the alternative, they sought a declaration that they lawfully rescinded the agreement and for forfeiture of the deposit to them.
- [2] When the matter came on for hearing, Mr Radcliff (for the applicants) announced that the applicants had elected to rescind the agreement. Thus, specific performance was no longer sought.

Background

- [3] On 28 May 2012, the applicants entered into a contract (“the contract”) with the respondent company for the sale of 9 Etna Street, Isle of Capri. The purchase price was \$1,350,000. The “Settlement Date” was a day 120 days from the date of contract.
- [4] The contract contained the following clauses relevant to this matter:
 - (a) Clause 5.1(1) – “Settlement must occur between 9am and 5pm on the Settlement Date.”
 - (b) Clause 5.3(1)(c) – “In exchange for payment of the Balance Purchase Price, the Seller must deliver to the Buyer at settlement ... any instrument necessary to release any Encumbrance over the Property ...”
 - (c) Clause 6.1 – “Time is of the essence of this contract, except regarding any agreement between the parties on a time of day for settlement.”
- [5] On 20 September 2012, the applicants’ solicitors (“Robinson & Robinson”) wrote to the respondent’s solicitors (“MBA”) noting that settlement was due to be effected on 25 September. It further stated:

“Notwithstanding that a specific time, date and place for settlement is arranged whether by mutual agreement or otherwise, any such

arrangement shall be deemed tentative, and we reserve our clients' right to effect settlement at any time on the day appointed pursuant to the terms of the contract."

- [6] At 9:58am on 25 September, MBA sought confirmation from Robinson & Robinson that the parties had agreed to extend settlement until 9 October. Robinson & Robinson advised shortly afterwards that no agreement had been reached regarding the extension of time. They further advised that settlement was to occur at 3pm that day at their office.
- [7] In a further facsimile on 25 September, Robinson & Robinson advised that settlement had been booked for 3pm at SAI Global, Southport ("SAI"). That facsimile contained a statement reserving the applicants' rights identical to that in the 20 September letter.
- [8] There is some dispute as to the details of what occurred at the SAI office on 25 September, but it is uncontroversial that settlement did not occur.
- [9] At 4:36pm that day Robinson & Robinson wrote to MBA stating that settlement did not take place and "your client is in fundamental breach of the contract of sale as settlement was not effected before 5.00pm as a result of your client's inability to settle and we reserve our rights".
- [10] On 26 September, MBA denied that their client was in fundamental breach of the contract. They further stated:
 "Your clients were not able to demonstrate that they were ready willing and able to settle at 3.00pm and in particular were unable to produce a release of Mortgage from Westpac Banking Corporation. Your clients' inability to deliver clear title at the time nominated by you is a clear breach of your clients' obligations under the Contract."
- [11] The applicants commenced these proceedings on 17 October 2012.

25 September

- [12] There are differing accounts as to what occurred at the SAI offices when settlement was supposed to take place.
- [13] This application was originally to be heard on 25 October 2012 but was adjourned to allow the parties to file further material and leave was given to cross-examine the deponents. Notwithstanding that there were some differences in the accounts of the events on 25 September, neither party sought to cross-examine any deponent.
- [14] The applicants' representative at settlement was Mr Grenville Hughes, an accountant in the employ of Robinson & Robinson. He says he arrived approximately five minutes before 3pm and spoke to the SAI representative, Ms Pauline Muirhead. He says Ms Muirhead informed him that the release of mortgage was in transit due to some confusion and directed him to the respondent's representative, Ms Sharon Sherlock. He says that he told Ms Sherlock the document would arrive within ten or 15 minutes. Ms Sherlock then told him she had been instructed to attend settlement at 3pm and to leave if it did not take place within five minutes. Mr Hughes says she left at approximately 3:05pm without showing him any documentation.

- [15] Ms Sherlock has also sworn two affidavits in these proceedings deposing to her version of events. She says that after some communication with Robinson & Robinson, “just before 1.00pm, I expected settlement to occur at 3.00pm, at SAI Global, Southport”. She attended the SAI office at about 2.55pm and informed Ms Muirhead that she was there for the “Caprice settlement”. She says Ms Muirhead then said to her words to the effect of: “The Release is not here, it’s at Robinsons”. Ms Sherlock then left the room to speak to her superior. When she returned to the settlement room, she says that Mr Hughes asked her if she was from MBA. She responded with “Yes” and says there were no further questions from Mr Hughes. Mr Hughes, Ms Muirhead and she had some conversations regarding unrelated matters and at 3:05pm, she announced that she was leaving as the release had not arrived. She says that as she was leaving Ms Muirhead told her the release was still coming, but that there was no other conversation apart from that.
- [16] The third account of events is that of Ms Muirhead. She says that at about 12:20pm, she had been instructed to attend the offices of Robinson & Robinson to conduct the settlement. Shortly before 3pm, she instructed another colleague, Amy, to attend those offices. At about 2.55pm, Ms Sherlock arrived at the SAI office and Ms Muirhead told her the settlement was supposed to be happening at Robinson & Robinson. She says Ms Sherlock told her she was going to make a phone call. Ms Muirhead says that when Mr Hughes arrived, she said to him “Amy has gone to your office to do the settlement.” She says this was in the presence and within earshot of Ms Sherlock. Ms Muirhead then telephoned Amy and told her to return to the SAI office immediately, which she says both Mr Hughes and Ms Sherlock could hear. She says that she told both of them the release would be arriving at about 3.10 or 3.15pm. She recalls Ms Sherlock saying: “I am under strict instructions to leave here at 3.05pm”. Ms Muirhead responded by saying that Amy would be back soon. At 3.05pm, she says Ms Sherlock walked out. She says Ms Sherlock did not produce any document during the time she was at the SAI office.
- [17] Ms Muirhead also gave unchallenged evidence that the relevant releases were delivered to SAI’s offices at about 3.15 to 3.20pm.
- [18] There is further evidence from Mr Anthony Robinson, principal of Robinson & Robinson, which is not disputed. He says he telephoned MBA at about 3.10pm and spoke to Mr Robert Balanda, and said words to the effect: “Robert, the Release is on its way back to Settlement. Can you ask your clerk to return to Settlement.” Mr Balanda said that he would seek instructions. Mr Robinson then said words to the effect: “Robert, you will note in our letter for Settlement, we have reserved our rights to settle at any time up to 5:00pm. Your client is still required to settle today.”
- [19] The evidence of Mr Hughes and Ms Muirhead is largely consistent. I am satisfied that Ms Sherlock was told that the release of mortgage would arrive ten or 15 minutes after 3pm. I am also satisfied that she left the SAI office without producing any documentation. I am further satisfied that, had she remained at the SAI office, the settlement could have taken place at no later than 3.20pm. I accept that Mr Robinson asked Mr Balanda to send Ms Sherlock back to SAI in order to conduct the settlement.

Submissions

- [20] Mr Radcliff for the applicants submitted that his clients were ready, willing and able to settle some 15 minutes after settlement had originally been scheduled. He concedes that Mr Robinson did not state a new time for settlement while on the phone with Mr Balanda, but he did request that the clerk turn around and attend settlement immediately. He says that this is sufficient to demonstrate readiness, willingness and ability to settle within the specified time.
- [21] Mr Barlow argued that the applicants should have called for a fixed settlement time once they obtained the release of mortgage. He says that there was time left in the day for the applicants to reschedule resettlement and call for tender, which they did not do. He submits that the applicants were not able to provide clear title and, thus, they were unable to perform their obligations under the contract.

Discussion

- [22] In *Aussie Invest Corporation Pty Ltd v Pulcesia Pty Ltd*¹, Dodds-Streeton J considered a number of authorities² relating to the failure to settle at an appointed time. Her Honour synthesised the reasoning in those cases in this way:³

“[313] The above authorities recognise that, although it is ultimately a matter of construction of the particular documents in each case, ordinarily where only a date is specified, the hour fixed for settlement is a matter of convenience, and the purchaser (or the vendor, as the case may be) is entitled to settle at any time during the final day. If, however, a particular hour or period is specified by which completion must occur, the stipulation will be given effect.”

- [23] The cases which her Honour considered were mostly concerned with whether or not a settlement could take place outside business hours, whether a solicitor’s office should remain open after business hours for that purpose and so on.
- [24] In this case, the general principle set out by her Honour is, effectively, part of the contract. Clause 6.1 specifically provides that time is not of the essence with respect to any agreement between the parties on a time of day for settlement. The applicants had nominated a time for settlement which had been accepted by the respondent. The applicants’ inability to settle at 3pm did not give the respondent the right to rescind. The applicants had until 5pm to settle and the evidence establishes that they were able to do that by no later than 3.20pm.
- [25] The request by Mr Robinson that MBA’s clerk “return to settlement” was a call for the respondent to settle and the respondent was obliged to do so.
- [26] The respondent’s failure to complete was a breach of its obligations which entitled the applicants to do as they have done and rescind and to forfeit the deposit.

¹ (2005) 13 VR 168.

² *Paclyn Pty Ltd v GP Harris Real Estate Pty Ltd* (1987) 4 BPR 9267; *Ex parte Robertson* [1983] 1 Qd R 526; *Re Ronim Pty Ltd* [1998] 2 Qd R 172 and *Jeppesons Road Pty Ltd v Di Domenico & anor* [2005] ANZ Conv R 258.

³ *Aussie Invest Corporation Pty Ltd v Pulcesia Pty Ltd* (2005) 13 VR 168, 207.

Orders

[27] The Court declares that:

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