SUPREME COURT OF QUEENSLAND

CITATION:	*Tonge v Living Gems Pty Ltd* [2016] QSC 102
PARTIES:	**JAMES MALCOLM TONGE AS TRUSTEE FOR THE BARR TRUST** (plaintiff) **v** **LIVING GEMS PTY LTD A.C.N. 010 186 151** (defendant)
FILE NO:	3114 of 2016
DIVISION:	Trial
PROCEEDING:	Miscellaneous Application (Civil)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2016
JUDGE:	Atkinson J
ORDERS:	**1. Summary judgment be entered in favour of the defendant on the plaintiff's claim pursuant to rule 293 of the *Uniform Civil Procedure Rules* 1999 (Qld);** **2. Caveat number 717116653 be removed pursuant to section 127 of the *Land Title Act* 1994 (Qld);** **3. The plaintiff's application is dismissed; and** **4. The plaintiff is to pay the defendant's costs of and incidental to the defendant's application and the proceeding on an indemnity basis pursuant to clause 9.7 of the contract between the parties dated 28 November 2014.**
CATCHWORDS:	REAL PROPERTY – FIXTURES TO LAND – DEGREE OF ANNEXATION – RESTING ON OWN WEIGHT – where the plaintiff alleges the defendant was in breach of contract for the sale of land by removing large piles of rocks from that land – where the evidence showed that the rocks were moved onto the land for storage or stockpiling, not by nature but by human intervention – whether the contract for the sale of land included the rocks resting on it PROCEDURE – CIVIL PROCEEDINGS IN STATE AND

TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT: STAY OR DISMISSAL OF PROCEEDINGS – where the defendant submitted that the plaintiff had no reasonable prospect of demonstrating that the rocks were purchased as part of the contract for the sale of land and sought summary judgment – whether the plaintiff had no real prospect of succeeding on all or part of his claim – whether there was no need for a trial of the claim or part of the claim

EQUITY – GENERAL PRINCIPLES – MISTAKE – EQUITABLE REMEDIES – RECTIFICATION – OTHER PARTICULAR CASES – where plaintiff sought leave to amend his claim and statement of claim to reflect what was said to be the common intention of the parties that the rocks formed part of the land – where there was no evidence from which to infer such a common intention – whether the plaintiff would be able to demonstrate by clear and convincing proof that the contract should be rectified

Land Title Act 1994 (Qld), s 127
Uniform Civil Procedure Rules 1999 (Qld), r 293

Dearden v Evans (1839) 5 M&W 10, cited
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, followed
Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603, cited
J M Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd (No 5) [2010] QSC 389, cited
Mills v Stokman (1967) 116 CLR 61, cited
Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603, cited
Swain v Hillman [2001] 1 All ER 91, followed

COUNSEL: P W Hackett for the plaintiff
R J Anderson QC for the defendant

SOLICITORS: Colwell Wright for the plaintiff
Cooper Grace Ward for the defendant

[1] This decision is in respect of two applications which were before the court. The first was an application by the defendant, Living Gems Pty Ltd ("Living Gems"), for summary judgment to be entered in its favour pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") and further, or in the alternative, that Caveat No. 717116653 ("the caveat") be removed pursuant to s 127 of the *Land Title Act* 1994 (Qld), and for costs. The second application was an application by the plaintiff, James Malcolm Tonge as trustee for The Barr Trust, filed by leave at the hearing of the defendant's application for summary judgment, for leave to amend his Claim with consequent amendments to the Statement of Claim.

[2] This action commenced on 24 March 2016 with a claim filed by the plaintiff for specific performance of a contract for the sale of land and a declaration that the plaintiff holds an interest in the land as purchaser of an estate in fee simple. The land in question is Lot 5, Hawthorne Street, Beaudesert in the State of Queensland, more particularly described as Lot 5 on Survey Plan 145499 in the County of Ward, Parish of Beaudesert/Nindooinbah being the whole of the land contained in Title Reference 50370831 ("the land'). The Statement of Claim pleaded that by a contract in writing dated 28 November 2014 the defendant agreed to sell the land to the plaintiff.

[3] The contract for the sale of the land was subject to certain special conditions as well as standard terms. One of the special conditions, Special Condition 3, determined what would be the settlement date. Settlement was to be effected on the earlier of 12 months from the date of contract or 30 days from the date of issue of operational works approval by the local authority. As the operational works approval had not issued, the settlement date was to be 28 November 2015. On 24 November 2015, the settlement date of the contract was extended by agreement to 29 January 2016 with time to remain of the essence.

[4] Paragraph 7 of the Special Conditions was in the following terms:

> "7. **Condition of Property**
>
> a. The Buyer warrants that it has had the opportunity to fully inspect the property and satisfy itself in relation to the property, improvements and the permitted use of the property before entering into this Contract, the Property is sold in an 'as is where is condition' with all faults and defects whether or not they are apparent by inspection and subject to any contamination, requisition, infestation or dilapidation.
>
> b. The description and particulars of the property and improvements set out in the items schedule are taken to be correct and the sale under this Contract is not effected [*sic*] by any error in the boundaries or area of the land and any encroachment or other unapproved improvement which exists and the Buyer must make no claim or raise any objection to the same.
>
> c. The Buyer:
>
> (i) buys the property subject to any defects, dilapidation, contamination, or the presence of any dangerous substance or thing as at the Date for Completion and any liability concerning it or them under any law; and
>
> (ii) buys the property subject to all services and installations, and acknowledges that no warranties are given in relation to the same, including as to their usability, quality or fitness for purpose, their location, nature, condition, legal existence, their location, fitness or suitability for any purpose, and
>
> (iii) buys the property subject to any unregistered encumbrances, faults, or other problems, whether or not they are apparent by inspection, and acknowledges that no warranty is provided as to

> whether the use of the property is permitted or approved under any law or regulation."

[5] Standard Clause 5.5 of the contract required the seller to give the buyer vacant possession of the land on the settlement date.

[6] In paragraph 6 of the Statement of Claim the plaintiff alleged that when the contract was entered into there was approximately 10,000 cubic metres of above-ground rock situated on the property ("the rocks").

[7] The plaintiff pleaded in paragraph 7 of the Statement of Claim that because of standard condition 5.5 and special condition 7.a, the defendant was obliged to provide vacant possession of the land including the rocks to the plaintiff on the settlement date. The plaintiff alleged that the defendant did not do so because it removed or caused to be removed all of the rocks from the land between the entry into the contract on 28 November 2014 and 29 January 2016.

[8] The plaintiff claimed this was a substantial breach of contract, that the contract did not settle on 29 January 2016, that the defendant purported to terminate the contract on the basis the plaintiff had failed to pay the balance of the purchase price on 29 January 2016 and that the defendant had no right to terminate the contract. The plaintiff claimed that it rejected the defendant's purported termination of the contract, affirmed the contract and remained ready, willing and able to perform the contract. On 8 March 2016 it lodged the caveat over the land.

[9] In the contract the land is described as vacant land at Lot 5 Hawthorne Street, Beaudesert being Lot 5 on Survey Plan 145499 in the County of Ward in the Parish of Beaudesert/Nindooinbah, Title Reference 50370831. The included chattels are said to be nil. The term "improvements" is defined to mean fixed structures on the land.

[10] The Defence pleads that when the plaintiff's solicitors requested an extension of time on 18 November 2015 to settle the contract to the end of January 2016, they also referred to the removal of the rocks. The reference in the letter by the solicitors for the plaintiff of 18 November 2015 is:

> "We are also instructed that approximately 10,000 cubic metres of rock has been dumped on the property and our client asked you to seek instructions as to your client's intentions in respect of the removal of the rock."

[11] This and the other letters herein referred to are exhibited to an affidavit filed in this matter by Mr Puljich, a director of the defendant. The reply to that letter from the defendant's solicitors was dated 23 November 2015. It agreed to the extension of the date for settlement to 29 January 2016 on certain conditions. One of those was said to be "our clients will remove the rocks prior to settlement, however [if] this does not occur, then the buyer will be entitled to retain $100,000 until the rocks are so removed after settlement." Time was to remain of the essence, the deposit was to be increased and the deposit was to be released to the seller. By letter dated 24 November 2015 the plaintiff's solicitor accepted the grant of an extension of the date of settlement. The letter makes no reference to the removal of the rocks.

[12] On 11 January 2016, the plaintiff's solicitor sought an extension of time for settlement to 11 March 2016. On 14 January 2016, the defendant's solicitors said the defendant

was prepared to agree to the extension of the settlement date on certain conditions including that time was to remain of the essence and an extension fee was paid. On 14 January 2016, the defendant's solicitors wrote to the plaintiff's solicitors noting that settlement was due to be effected on 29 January 2016. They said they were instructed that the rocks had been removed from the property and the defendant therefore invited the plaintiff to inspect the property to confirm that. The letter concluded "If, following your client's inspection, they do not believe that the rocks have all been removed then please provide us with a list of outstanding items for our client to consider."

[13] On 21 January 2016, the plaintiff's solicitors wrote to the defendant's solicitors asking that the defendant reconsider his position relating to the granting of an extension of time for completion and making certain other offers with respect to payment to the defendant. No reference was made to the removal of the rocks and certainly no objection by the plaintiff to the defendant's having done so.

[14] On 25 January 2016, the defendant's solicitors wrote to the plaintiff's solicitors saying it was prepared to grant an extension to 11 March 2016 but only subject to certain conditions. On 29 January 2016, the defendant's solicitors sent an email to the plaintiff's solicitors confirming that settlement was due at 3.30pm that day at the office of the defendant's solicitors and that the defendant was ready, willing and able to effect settlement in accordance with the terms of the contract. At 4.10pm the defendant's solicitors emailed the plaintiff's solicitors noting that the plaintiff had failed to settle at 3.30pm and reserving the defendant's rights.

[15] On 2 February 2016, the plaintiff's solicitors wrote to the defendant's solicitors regarding settlement saying that the plaintiff's lender was insisting on further collateral security over another property to secure the advance and requesting a further 21 days extension of the time for completion. On 8 March 2016, the defendant's solicitors sent an email to the plaintiff's solicitors saying that in view of the failure of the plaintiff to settle on 29 March 2016, the defendant had elected to terminate the contract and the deposit had been forfeited.

[16] On 9 March 2016, a new firm of solicitors acting on behalf of the plaintiff wrote to the solicitors for the defendant disputing the right of the defendant to terminate the contract and affirming the contract saying *inter alia* that, as neither party attended for settlement on 28 November 2015, time ceased to be of the essence and there was no breach when settlement did not occur on 29 January 2016. The letter also complained about the removal of the rocks which was said to be contrary to special condition 7 of the contract.

[17] On 10 March 2016, the defendant's solicitors wrote to the plaintiff's new solicitors. With regard to the removal of the rocks it said that in the plaintiff's letter of 18 November 2015 he requested, *inter alia*, removal of rocks that had been placed on the property and the defendant had done so.

[18] The plaintiff then lodged the caveat over the property on 8 March 2016.

[19] It should be noted that on each occasion when time was extended one of the conditions was that time was to remain of the essence.

[20] In the Defence filed by Living Gems it alleged, *inter alia*, that the rocks were not included chattels or improvements to the land and were not included in the contract and were removed at the request of the plaintiff. It also alleged that Mr Puljich of the defendant had a conversation with the plaintiff's agent Les Merton prior to entering into the contract where Mr Merton asked Mr Puljich about the rocks, Mr Puljich said they were the property of the adjacent land owner Mr Usher but could be removed on demand and Mr Merton stated that the plaintiff would want the rocks removed from the property prior to settlement. This was denied by Mr Merton in an affidavit filed by the plaintiff and that denial must be taken to be correct for the purposes of this application.

[21] The application for summary judgment by the defendant was filed on 7 April 2016. The matter was adjourned on 20 April 2016 and then heard on 4 May 2016. On that hearing the plaintiff sought leave to read and file an Amended Claim and Amended Statement of Claim seeking in addition to the claims previously sought a declaration that the defendant's purported termination of the contract on 8 March 2016 was invalid and of no effect and, in the alternative to specific performance, an order rectifying the contract in the manner pleaded in paragraph 7B of the Amended Statement of Claim and an order that the contract as rectified be specifically performed by the defendant and carried into effect.

[22] With regard to the claim for rectification the relevant paragraphs of the Amended Statement of Claim are paragraphs 7A and 7B which provided as follows:

> "7A In the alternative if the Contract as expressed did not require the defendant to provide the Rock to the plaintiff on the Settlement Date, the Contract failed to express the common intention of the parties.
>
> 7B In the alternate premises pleaded in paragraph 7A, the Contract should be rectified so that the 'Land' was defined to include the Rock."

[23] The reference in paragraph 7 of the Amended Statement of Claim to paragraph 6 is a reference to the allegation that when the contract was entered into there was approximately 10,000 cubic metres of above-ground rock situated on the land.

[24] On 20 February 2016, the defendant entered into a contract to sell the land to Philip Usher Constructions Pty Ltd. The purchase price of $5,000,000 was the same as the purchase price in the contract to sell the land to the plaintiff. The settlement date was said to be 90 days after the date of the contract. That settlement date has given some urgency to the determination of the defendant's application. The contract was not subject to or conditional upon the buyer obtaining development approval.

[25] In an affidavit read in support of his application, the plaintiff says that far from wanting the rocks removed he planned to use them in the course of the subdivision in order to construct necessary retaining walls. He says that the letter from his solicitor dated 18 November 2015 "imperfectly reflects what he had instructed him to ask". He said by that time he had become aware that the rocks had been removed from the property and he wanted to know what the defendant intended to do about that.

[26] Rule 293 of the UCPR provides that a defendant may, at any time after filing a Notice of Intention to Defend, apply to the court for judgment against a plaintiff. The defendant's case for the purpose of this application is that the plaintiff has no reasonable prospect of demonstrating that the rocks were purchased as part of the contract for the sale of the land. If that is so, it is submitted that the plaintiff has no reasonable prospect of succeeding on his claim and there should be summary judgment for the defendant.

[27] The court will only grant summary judgment if it is satisfied that the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim and there is no need for a trial of the claim or a part of the claim. The court then has a discretion to give judgment for the defendant against the plaintiff for all or part of the plaintiff's claim. This rule is the mirror image of rule 292 under which summary judgment can be given for a plaintiff. As Williams JA said in *Deputy Commissioner of Taxation v Salcedo*,[1] quoting Lord Woolf MR in *Swain v Hillman*:[2]

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or … they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[28] However as McMurdo P cautioned in the same case "nothing in the UCPR … detracts from the well-established general principle that issues raised in proceedings will be determined summarily only in the clearest of cases."

[29] It was not disputed that the rocks had been stockpiled on the land and sat under their own weight. They were not a natural part of the land. They were not improvements (defined to mean "fixed structures") nor "included chattels". As the defendant submitted, unless they were part of the land or their inclusion was specifically covered by Clause 7.a of the Special Conditions the rocks were not part of the property the subject of the contract and their removal did not contravene the plaintiff's rights.

[30] The parties referred to two cases that might be relevant to the determination of this question. The first was *Dearden v Evans*.[3] The question in that case was whether or not large masses of stone which had fallen from time to time from cliffs above a field and had become embedded in the soil were part of the land. Parke B held:

> "These stones have been in the same state as far back as living memory goes, and are to be considered a portion of the soil, just as much as the gravel which forms a portion of the bed of a river, or as a great part of the soil in different parts of the country, which have been detritus from the neighbouring hills: therefore I think they must be considered part of the soil …."

[31] The next relevant case is *Mills v Stokman*[4] where the High Court was required to consider whether dross discarded from the quarrying of slate on land remained part of

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1 [2005] 2 Qd R 232.
2 [2001] 1 All ER 91 at [11]
3 (1839) 5 M&W 10.
4 (1967) 116 CLR 61.

the land. There were two reasons why the Court held that it was part of the land. Menzies J said:[5]

> "The rubble slate in the dump upon the land near Goulbourn owned by the appellant Daphne May Mills is, and was at all times material, part of the land either because the rubble was not severed from the land or, upon being dumped, it became part of the land again."

[32] Kitto J expressed the two possibilities in this way:[6]

> "It may be right to conclude the materials forming the mound became personalty upon being dug up and were later reincorporated into the soil by being dumped on the land with the intention (to be inferred from the evidence, exiguous though it is) of being abandoned so as to become a permanent accretion to the surface. On the other hand the right conclusion may be that the materials were never so severed from the soil as to be converted into personalty. I should myself be inclined to favour the latter view on the ground that there is an element of intention in severance, just as there is in the kind of attachment which makes a chattel part of the realty, and that the proper inference from the known facts is that the company that worked the quarry and built the dump did not have the requisite intention of permanent severance with respect to anything but so much of the slate as it carried away."

[33] Barwick CJ expressed his conclusion in the following terms:[7]

> "I have come to think that the proper inference from what is known by evidence in the suit is that the heap represented unwanted dross cast on one side with the intention that it should remain on the land indefinitely, and, by implication, that it should form part of it. In my opinion, the proper inference from its continuous association with the land in the meantime is that it had been dealt with as realty by succeeding owners. Those inferences are enough within the authorities to warrant the conclusion that the heap of dross was on 14th November 1955 part of the realty. … In my respectful opinion, it is not correct to regard this heap of dross as comparable to some separate substance attached to the land by no more than its own weight. In the course of time, like of a heap of earth, it had no doubt become integrated at its base with the subjacent soil. Nor, in my opinion, is it correct to ignore the intention which the quarrying company must have had of abandoning to the land the unwanted and worthless dross of its operations."

[34] In *Mills v Stokman*, quarrying had been carried out on the land and slate taken away as a result of the quarrying but the rest of the material in the quarry had remained dumped on the land. This material had always been part of the land and remained part of the land notwithstanding that it had been moved from one part of the land to the other.

[35] The rocks in this case are in an entirely different category. The evidence shows that they were moved onto the land for storage or stockpiling, not by nature but by human intervention and never were or became part of the land. The contract for the sale of the

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5 At 78.
6 At 76.
7 At 71.

land did not include the rocks as the rocks were not part of the land, were not improvements nor included chattels.

[36] The reference in the contract of sale of the land to its being in an "as is where is condition" does not assist the defendant if the rocks were not part of the land and therefore not the land that had been agreed to be sold.

[37] Accordingly, the defendant was not in breach of the contract when it removed the rocks from the land and is not precluded from terminating the contract because of the plaintiff's breach in failing to complete.

Rectification

[38] The plaintiff sought leave, in the alternative, to amend his claim and statement of claim to claim rectification of the contract to reflect what the plaintiff alleged was the common intention of the parties. That common intention is said to be that the rocks formed part of the land.

[39] There is no evidence from which it could be inferred that there was a common intention that the rocks formed part of the land to be sold.

[40] The terms of the letter from the solicitor for the plaintiff sent on 18 November 2015, together with the defendant's consequent promise to remove the rocks prior to settlement with a financial penalty if it did not, amply demonstrate that there was at that time no common intention at that time that the rocks be part of the sale of the land.

[41] There is nothing to suggest that the mutual intention of the parties was any different at the time of entering into the contract. It is not the case that the plaintiff would be able to demonstrate by "clear and convincing proof"[8] that the contract should be rectified to reflect a common intention which failed to be articulated in the contract as it is.

[42] I would accordingly refuse leave to amend the claim.

Conclusion

[43] The defendant is entitled to summary judgment and, accordingly, the maintenance of the caveat is not warranted and it should be removed.

Orders

1. Summary judgment be entered in favour of the defendant on the plaintiff's claim pursuant to rule 293 of the *Uniform Civil Procedure Rules* 1999 (Qld);

2. Caveat number 717116653 be removed pursuant to section 127 of the *Land Title Act* 1994 (Qld);

3. The plaintiff's application is dismissed; and

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[8] *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [161]–[165]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [451]; *J M Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd (No 5)* [2010] QSC 389 at [14].

4. The plaintiff is to pay the defendant's costs of and incidental to the defendant's application and the proceeding on an indemnity basis pursuant to clause 9.7 of the contract between the parties dated 28 November 2014.