

36/99; [1999] VSC 99

SUPREME COURT OF VICTORIA

DEAN v SHEN & ANOR

Hampel J

16, 31 March 1999

CIVIL PROCEEDINGS – SALE OF LAND – CONTRACT CONDITIONAL UPON SATISFACTORY BUILDING REPORT BY 23 AUGUST – OFFER ACCEPTED ON 23 AUGUST – UNSATISFACTORY REPORT FURNISHED ON 28 AUGUST – VENDORS NOTIFIED FOLLOWING DAY THAT PURCHASER NOT PROCEEDING WITH CONTRACT – CLAIM BY VENDOR FOR DAMAGES FOR BREACH OF CONTRACT – FINDING BY MAGISTRATE THAT CONTRACT BECAME UNCONDITIONAL ON 23 AUGUST – WHETHER MAGISTRATE IN ERROR.

On 23 August D. offered to purchase a property owned by S. A condition was inserted into the contract "conditional on a satisfactory report by a construction engineer by 23 August". D's offer was accepted on 23 August and the following day S. contracted to purchase another property. On 28 August D. received an unsatisfactory engineer's report and on the following day informed S. of the report and the fact that D. was not proceeding with the contract. Subsequently, S. claimed damages for breach of contract. The magistrate found in favour of S. on the basis that "the contract had a condition that the defendant could have availed himself of, yet did not; he did not elect to withdraw from the contract before it became unconditional". Upon appeal—

HELD: Appeal allowed. Magistrate's order set aside.

The contract did not come into existence as a binding contract between the parties until it was accepted. When it was accepted by S. on 23 August, D. was entitled to avail himself of the opportunity provided by the special condition as long as he acted honestly and reasonably in endeavouring to obtain the building report and in notifying S. of the result of the building report. Accordingly, the magistrate was in error in finding that the contract became unconditional when it was accepted and in failing to consider whether D. acted honestly and reasonably by relying on the special condition.

***Meehan v Jones* [1982] HCA 52; (1982) 149 CLR 571; 42 ALR 463; (1982) 56 ALJR 813, applied.**

HAMPEL J:

1. This is an appeal under s109 of the *Magistrates' Court Act* 1989 against an order of the Magistrates' Court allowing a claim by the respondents (plaintiffs) for breach of contract. The appellant (defendant) was ordered to pay damages together with "interest" and costs.

2. The appellant was the prospective purchaser of a property which was owned by the respondents. On 17 August 1996, the appellant offered to purchase the property for \$118,000.00. That offer was rejected. On 18 August 1996, the appellant offered \$122,000.00 and requested that the contract be conditional on a satisfactory building report. The following condition was inserted into the contract: "conditional on a satisfactory report by a construction engineer by 23 August 1996".

3. On 18 August 1996, the respondents' agent, Mr Traynor, told the appellant: "you've got to have it (the report) in time otherwise it's not a valid condition and the contract becomes unconditional". He again warned the applicant on 20 August 1996 and on 22 August 1996.

4. The acceptance of the offer was communicated to the appellant on Friday, 23 August 1996. There was a dispute before the Magistrate whether the offer was communicated at 9:00am or 8:00pm. For the purposes of the argument before me, no such issue was relied upon. The appeal proceeded on the basis that acceptance was communicated at 8:00pm. On 24 August 1996, the respondents contracted to purchase another property.

5. The appellant received an unsatisfactory engineer's report on 28 August 1996. On 29 August 1996, he told the respondents' agent that he had obtained an unsatisfactory report and was not proceeding with the contract.

6. The Magistrate found in favour of the respondents on the basis that "the contract had a condition that the defendant could have availed himself of, yet did not; he did not elect to withdraw from the contract before it became unconditional".

7. The question of law raised by the appeal is:-

Having received the Engineer's report on 28 August 1996, was it open to the purchaser to rescind the contract or had the contract become unconditional by 24 August 1996?

8. Mr Farrow, who appeared for the appellant submitted that the appellant was under no obligation to satisfy the special condition before acceptance was communicated to him. He argued that the failure by the appellant to avail himself of the condition by midnight on 23 August 1996 did not prevent him from rescinding the contract because he acted honestly and reasonably in relying on the condition after acceptance was notified.

9. Mr Farrow relied on *Meehan v Jones* [1982] HCA 52; (1982) 149 CLR 571; 42 ALR 463; (1982) 56 ALJR 813, in which Gibbs CJ considered a contract subject to the purchaser receiving approval for finance. His Honour said (at CLR p588):-

"Primarily the object of such a clause is to benefit or protect the purchaser (*Zieme v Gregory* [1963] VicRp 34; [1963] VR 214, at pp216, 222); *Barber v Crickett* [1958] NZLR 1057, at p1058; *Beauchamp v Beauchamp* (1972) 32 DLR (3d) 693; affd (1974) 40 DLR (3d) 160), by ensuring that he is not under a binding obligation to complete if he is unable to obtain finance ... The primary object of the condition being the protection of the purchaser, it is sensible to treat it as stipulating for finance that it is satisfactory to the purchaser or his nominee, subject to an implied obligation that he will act honestly, or honestly and reasonably, in endeavouring to obtain finance and in deciding whether to accept or reject proposals for finance."

10. Mr Tallarida, who appeared for the respondents, submitted that the contract became unconditional on 23 August 1996 because the appellant failed to avail himself of the special condition by that date and thereby repudiated the contract. The special condition was an "indulgence", inserted for the benefit of the appellant who had the choice to avail himself of it if he wished.

11. He further submitted that the appellant had sufficient time, between 18 August 1996 and 23 August 1996, to obtain a report and was not entitled to an extension of time. Alternatively, he argued that the defendant effectively waived the benefit of the special condition after 23 August 1996.

12. In my opinion, the Magistrate erred in law in holding that the contract became unconditional by midnight on 23 August. The contract did not come into existence as a binding contract between the parties until it was accepted. It was then that the appellant was entitled to avail himself of the opportunity provided by the special condition, as long as he acted honestly and reasonably, as contemplated in *Meehan v Jones*.

13. The Magistrate having found that the contract became unconditional when it was accepted would not have had to consider whether the appellant acted honestly and reasonably and thereby was entitled to rely on the special condition. Both the finding that the contract became unconditional and the failure to consider the question whether the appellant acted honestly and reasonably by relying on the special condition, in my opinion amount to errors of law.

14. On the facts as found by the Magistrate, it was in law open to the purchaser to rescind the contract and there was no evidence which could support a finding that the appellant acted otherwise than honestly and reasonably in obtaining the report and notifying the respondents on 29 August.

15. The appeal must therefore be allowed and the decision of the Magistrate be set aside. The order for damages, costs and "interest" are set aside. The respondents are to pay the appellant's taxed costs of the appeal and costs in the court below.

APPEARANCES: For the plaintiff Dean: Mr FE Farrow, counsel. Dean & Co, solicitors. For the defendant Shen: Mr V Tallarida, counsel. Thomas Egan & Associates, solicitors.