49/10; [2010] VSCA 227

SUPREME COURT OF VICTORIA — COURT OF APPEAL

UMBERS v KELSON

Neave, Redlich and Hansen JJA

22 April, 10 September 2010

CONTRACT – SALE OF BUSINESS – SUBJECT TO FINANCE – LETTER FROM PURCHASER'S SOLICITORS REQUESTED EXTENSION OF FINANCE APPROVAL DATE AND STATED THAT, IF EXTENSION NOT AGREED TO, VENDORS MAY TREAT LETTER AS WRITTEN NOTICE ENDING CONTRACT – NO RESPONSE BY VENDORS – PURCHASER FAILED TO COMPLETE – VENDORS CLAIMED LOSS ON RESALE – CLAIM UPHELD – MAGISTRATE HELD PURCHASER ESTOPPED FROM RELYING ON LETTER AS ENDING CONTRACT – APPEAL TO TRIAL DIVISION DISMISSED – WHETHER LETTER A WRITTEN NOTICE ENDING CONTRACT – REQUIREMENTS OF A NOTICE ENDING A CONTRACT – TERMS OF LETTER – WHETHER PLEA OF ESTOPPEL RELEVANT – WHETHER MAGISTRATE IN ERROR.

U. agreed to purchase a business from K. A contract of sale was executed between the parties which provided for the amount to be paid, the settlement date and subject to a condition as to U.'s finance being approved by 15 August. On 17 July due to a problem with U.'s obtaining finance, a letter was sent to K. requesting an extension of the finance condition for another 30 days. The letter also said that if an extension was not granted the "letter may be treated as written notice ending the contract". This letter was not replied to. However, the parties continued to have contact and time was spent by K. in training U. in running the business, introducing U. to clients and/or suppliers and disclosing confidential information in relation to the business in the form of manuals. When U. failed to complete the contract, K. sold the business to another person thereby incurring a loss. Subsequently, K. claimed from U. damages for the loss allegedly suffered and this claim was upheld by the Magistrate. In his findings, the Magistrate held that the letter requesting the extension of time for the payment did not end the contract. He further found that having regard to U.'s conduct, he was estopped from relying upon the purported termination of the contract as contained in U.'s letter of 17 July. The appeal to the Supreme Court (Smith J) was dismissed (MC43/08; [2008] VSC 348. Upon appeal—

HELD: Appeal dismissed.

1. The central issue was whether the 18 July letter terminated the contract. That turned on the construction and terms of the letter. If the letter did not terminate the contract, the contract remained on foot and estoppel fell away.

2. The general principle to be distilled from decided cases on the question of the proper interpretative approach to a notice of termination is that a notice purporting to terminate a contract must do so in clear and unequivocal terms.

***Catley v Watson* (1983) V ConvR ¶54-003, followed.**

3. The judge below was correct to conclude that the 18 July letter was not a 'written notice ending the contract'. The letter did not state that it was a 'notice ending the contract' or that the appellant thereby gave notice to 'end the contract' pursuant to general condition 4, or even that the contract would be terminated if the approval date was not extended. Rather, the letter gave the respondents the option of treating the letter as a written notice ending the contract, in the event the extension was not agreed to. The letter thus left the question of whether the contract was to be ended entirely in the hands of the respondents, at least in the event that they did not agree to the extension. On the other hand, in the event that the respondents did agree to the extension, the letter did not purport to end the contract. It follows that on neither scenario could the letter be regarded as a written notice ending the contract. It was clear that the meaning of the letter was as stated above, and the judge was correct to conclude as he did.

4. Accordingly, the appellant's submission that a reasonable person would have understood the letter as ending the contract if, within a reasonable time, an extension was not granted is rejected. Such a meaning was not open on the terms of the letter, properly construed. But even if it be assumed that such a meaning was possible, the letter equally bore the other possible meaning, namely that it did not end the contract but merely gave the respondents the option to do so. In those circumstances the letter would have been ambiguous as it carried two potential meanings. Thus, the letter could not have operated as written notice ending the contract.

***Umbers v Kelson* MC43/2010; [2008] VSC 348, approved.**

5. In the circumstances, the alternative plea of estoppel was simply irrelevant.

NEAVE JA:

1. I have had the advantage of reading the judgment of Hansen JA in draft form. For the reasons given by him, I agree that the appeal should be dismissed with costs.

REDLICH JA:

2. I concur in the judgment of Hansen JA.

HANSEN JA:

3. Timothy John Kelson and Michelle Ina Kelson ('the respondents') sued Gary Rowland Umbers ('the appellant') in the Magistrates' Court at Warrnambool, claiming damages for breach of contract for the sale of a business. The magistrate gave judgment for the respondents in the sum of $61,524.20 together with interest of $3,959.46 and costs of $8,962.00, and dismissed the appellant's counterclaim which had sought the return of his deposit of $1,000. The appellant appealed on questions of law to a judge in the Trial Division who dismissed the appeal. The appellant now appeals by leave[1] from the judge's decision. For reasons that follow, the appeal must be dismissed. Before setting out those reasons it is necessary to refer to the facts and the reasons of the magistrate and the judge on appeal.

4. By a contract in writing dated 17 June 2005, the appellant agreed to purchase from the respondents for $220,000 an embroidery retail business conducted at shops 2 & 3, 743 Raglan Parade, Warrnambool, payable as to $1000 by way of deposit and the residue on the settlement date being 90 days from the date of the contract or earlier by agreement. Settlement of the sale was thus due on 15 September 2005. The Particulars of Sale included the following:

> FINANCE Lender: Silvan Ridge Mortgage Brokers
> Loan not less than $200,000.00
> Approval date: One month from the date herein

5. In relation to finance, general condition 4 provided:

> **FINANCE**
> 4. This contract is subject to the lender approving the finance for the purchase of the business by the approval date or any later approval date allowed by the vendor. The purchaser may end the contract if the loan is not approved by the approval date only if the purchaser –
> (a) has made immediate application for the loan,
>
> (b) has done everything reasonably required to obtain approval of the loan,
>
> (c) serves written notice ending the contract on the vendor on or before 2 business days after the approval date, and
>
> (d) is not in default under any other condition of this contract when the notice is given.
>
> All money must be immediately refunded to the purchaser if the contract is ended.

6. It was common ground that for the purpose of general condition 4, the approval date was 17 July 2005.

7. The shops at which the business was conducted were occupied under two separate leases, and the contract made usual provision for the vendor to obtain for the purchaser a lease of the business premises either by transfer of the current lease with the landlord's written consent or by a new lease.

8. On 28 June 2005 the respondents' solicitors wrote a letter to the appellant's solicitors requesting, in relation to one of the leases, '... a copy of your client's statement of financial position and any financial and business references which are available'. More generally, the letter requested advice of 'the outcome of your client's finance application at your earliest convenience'.

9. By letter dated 6 July 2005, the appellant's solicitors replied 'we suggest details sought in respect to references be put on hold until the contract becomes unconditional'. Nothing was said about the outcome of the appellant's application for finance.

10. Then, on 18 July 2005 the appellant's solicitors wrote to the respondents' solicitors stating that:

> Our client has not had finance approved at this stage.
> We seek an extension of one month to 17 August 2005.
> We understand the delay relates to the actual distribution to our client of shares under an estate, which will form security for the borrowings.
> Should you have any queries, please contact Mr. Basil Fogarty.
> In the event that an extension is not agreed to, you may treat this letter as written notice ending the contract.

11. The respondents' solicitors did not reply to that letter. The explanation appears in the evidence and the magistrate's findings. Having received the letter, the respondents' solicitors contacted the respondents' agent on the sale who in turn contacted the respondents who advised they were prepared to give the extension sought. But, as a result of a communication breakdown – the respondents believing that the agent was to advise their position to their solicitors (but which the agent did not do) – that agreement to the extension was not advised to the appellant or his solicitors. In these circumstances, the case was conducted on the basis that no extension of the approval date was agreed to.

12. The respondents' agent contacted the appellant in mid-August 2005 and asked whether he was still interested in purchasing the business. The appellant said that he was and the agent suggested he see the respondents. On 18 August the appellant attended at the respondents' business premises and met with the second respondent. The magistrate found that in 'a reasonably casual chat' the second respondent twice asked the appellant whether the finance had been approved. They discussed the appellant's finances and the general running of the business. The appellant told the second respondent that 'plan A had failed but that plan B was going ahead'. I note that 'plan B' involved proceeding on the basis of using funds rather than a loan to complete the purchase. The appellant again attended the business premises on 19, 23 and 24 August, where he undertook training in the business, was introduced to three main customers, and was provided with a computer manual relevant to the business.

13. On 24 August 2005 the respondents' solicitors wrote to the appellant's solicitors stating:

> Further to our discussion yesterday I have been advised by my client that he met with [the appellant] last night. [The appellant] advised that he had sufficient cash resources to settle within the next week and that that is his intention.
>
> I note that the Contract provides for settlement on 15th September, which given the necessity of the Landlord's consent is a more realistic date. Please confirm that your client will be in a position to meet this date and provide the information required to satisfy the Landlord as to the bona fides of the Purchaser.

14. On 29 August 2005 the appellant advised the respondents' agent that he could not get finance and was terminating the contract. The agent advised the respondents who spoke to the appellant but to no avail.

15. On 5 September 2005 the respondents' solicitors wrote to the appellant's solicitors stating:

> Further to my letter of 24th August, 2005 which I have not yet received a reply to, I am instructed by my client and my client's agent that they are receiving mixed signals from the Purchaser as to whether he will be able to settle this matter on 15th September next.
>
> My client requires performance of the Contract pursuant to its terms and if necessary will take proceedings to enforce same.
>
> If it is your client's intention to settle on 15th September, 2005 please advise so as a matter of urgency and forward references for us to provide to Landlord's solicitor.

16. On 12 September 2005, the appellant's solicitors wrote to the respondents' solicitors stating that:

> We refer to your fax of 24 August, your letter 5 September and your further fax 8 September 2005.[2]

> We advise our client has been unable to obtain finance in this matter. Accordingly, the contract is at an end.
>
> Our letter 18 July 2005 was clear. No response was received from your office. Accordingly, the effect of that letter was that the contract was at an end.

The letter went on to state that there were subsequent discussions between the parties, but denied that the appellant ever told the respondents that finance had been approved.

17. Also on 12 September the appellant's solicitors wrote to the respondents' agent, enclosing their above letter, advising that the appellant was unable to proceed with the purchase and requesting repayment of the deposit. Consistently with that, the appellant did not settle the contract on the due day, 15 September 2005. On that day, the respondents' solicitors wrote a letter to the appellant's solicitors stating, among other things, that the appellant had repudiated the contract and threatening proceedings. The appellant continued in his refusal to settle the transaction.

18. Subsequently, by a contract dated 23 February 2006 the respondents sold the business to new purchasers for $170,000 and in May 2006 commenced the proceeding to recover their losses. The judgment amount is comprised of the $50,000 loss on resale plus the costs and expenses of the resale.

The case in the Magistrates' Court

19. After pleading the relevant terms of the agreement, including general condition 4, the respondents' statement of claim alleged that:

> (a) during August 2005 the appellant affirmed and/or elected that the contract was to proceed to settlement (para 4);
>
> (b) by the letter of 12 September the appellant wrongfully repudiated the contract (para 5). The repudiation was wrongful in that the appellant had not complied with general condition 4 and/or did not give notice on or before two days after the approval date (para 6); and
>
> (c) the appellant failed to settle the contract on 15 September, as a result of which the respondents elected to rescind the contract, later reselling the business for $170,000.

20. The appellant's defence:

> (a) denied para 4;
>
> (b) denied para 5 and alleged that if the contract was on foot (which was not admitted) he gave valid notice of termination by his solicitors' letter dated 12 September;
>
> (c) denied para 6 and alleged that he complied with general condition 4; and
>
> (d) referred to the terms of the letter of 18 July and alleged that 'No extension for approval of finance was given, and as such the contract was at an end.' (para 9).

21. The respondents filed a reply which raised two issues. First, it was alleged that insofar as the appellant relied on the 18 July letter to allege termination of the contract pursuant to general condition 4, the termination was not lawful. Particulars to this plea stated that, contrary to the assertion in the letter (that finance had not been approved), the appellant had admitted that finance had been approved. Alternatively, if finance was not approved, the appellant had not complied with general condition 4 in that he had not done everything reasonably required to obtain approval of the loan for the purpose of the contract. Secondly, it was alleged that 'further or alternatively [the appellant] should be equitably estopped from relying upon the letters of [18] July 2005, or alternatively 12 September 2005, as valid termination of a Contract pursuant to [general condition] 4.' Particulars to this plea referred to pleaded and particularised statements and conduct of the appellant that caused the respondents to believe that the contract remained on foot. It was further stated that the respondents had acted to their detriment in reliance on such conduct, the detriment including time spent training the appellant in the business and introducing him to suppliers, and delay incurred in otherwise proceeding to resell the business.

22. It is to be noted that while the respondents' pleadings alleged that the appellant had not complied with general condition 4, that alleged non-compliance related to his efforts to obtain finance. This was reflected in the respondents' solicitor's opening before the magistrate in which he stated that the main issue was whether the appellant had satisfied the finance clause such as would entitle him to rely on the finance clause to get out of the contract. And while the solicitor added that the next issue was 'whether [the appellant] gave notice in accordance with the contract', he did not develop that submission any further, for example by suggesting that, on its terms, the 18 July letter did not operate to terminate the contract. Nor did he take up the matter in closing address. Further, it is to be noted that the respondents did not plead that the 18 July letter was not a 'written notice ending the contract' within the meaning of para (c) of general condition 4. In these circumstances, in the case before the magistrate there was no analysis of the effect of the 18 July letter.

23. In closing addresses before the magistrate, the appellant's counsel simply asserted that the letter of 18 July was not responded to and that the contract was then, in accordance with general condition 4, at an end on 18 or 19 July. This was to reiterate the plea in para 9 of the defence. Counsel did not specifically analyse the terms of the letter and explain how it was that on those terms the letter constituted written notice ending the contract. It is clear from the transcript that counsel simply asserted (and assumed) that the 18 July letter had, in the absence of any response to the letter, terminated the contract.

24. Early in the respondents' solicitor's closing address, the magistrate correctly observed that the effect of the 18 July letter was pivotal to the case. The magistrate drew attention to the final paragraph of the letter, which he read out, and observed that the extension was not agreed to. Unfortunately, however, the solicitor did not address the question whether the terms of the letter, properly construed, operated to terminate the contract. Rather, he focused on the question whether the appellant had satisfied paras (a) and (b) of general condition 4, as to which he contended that the appellant had not done everything reasonably required to obtain finance. Finally, the solicitor advanced the estoppel case as an alternative basis for relief. As to that, he submitted, in essence, that the appellant had represented to the respondents that 'things were still proceeding' and that the respondents had relied on that representation to their detriment, in that they wasted time and effort attending to what they thought was a continuing contract when they could otherwise have re-listed the business for sale. The magistrate observed in discussion that, if they were misled, the respondents could reasonably say they suffered detriment in not being able to get the property back on the market some months earlier than they did. He noted, however, that there was no evidence as to the financial detriment suffered, as no real estate agent gave evidence as to the state of the market at the times in question.

25. In a reserved decision, the magistrate described the 18 July letter as 'requesting an extension of one month for the finance to be approved and, further, if that finance approval was not received then the contract would be considered ended.' He stated that 'despite the notice of termination having been given the [respondents have] issued these proceedings seeking damages for breach of contract'. Later, in the context of considering whether the conditions in general condition 4 were satisfied, the magistrate stated that 'condition (c) was complied with, as notice was given on 18 July'. He also concluded that the appellant had proved on the balance of probabilities that he did everything reasonably necessary to obtain approval of the loan. Having so concluded, the magistrate stated that:

> If nothing else had occurred, that would have been the end of the matter, but other things did occur. That leads me to the last of the submissions put by [the respondent's solicitor], namely that the conduct of the [appellant] after 18 July 2005 was such as to have estopped [him] from avoiding the contract pursuant to general condition 4 or would act as a waiver of [his] right to do so.

As to this, the magistrate found that the appellant's actions after 18 July 'clearly induced [the respondents] into believing that the contract was going ahead' and that 'as a result of believing that the contract was continuing, [the respondents] either then extended or had already extended their overdraft at the bank by $25,000, with the agreed repayment date … being two days after the settlement of this contract'. The magistrate noted that the respondents obtained the $25,000 overdraft in order to pay trade creditors so the hand-over on settlement would be easier. That is, the respondents 'had borrowed the $25,000 on the basis the contract was proceeding. When it did not, they became so seriously financially embarrassed that they were unable to repay the

bank, which subsequently sued them for the money ... and obtained judgment against them'. The magistrate thus found that 'as a result of being misled by the actions of the [appellant] ... the [respondents] acted very much to their detriment'. The magistrate found detriment in the extension of the bank overdraft by $25,000 and the fact that when the contract did not proceed the respondents were unable to repay the overdraft and were sued to judgment by the bank. The magistrate concluded that the appellant was 'estopped from relying on the purported termination of the contract contained in [the] 18 July [letter], or, alternatively, that the [appellant] had 'waived his right to rely on that termination'. Accordingly the respondents were entitled to judgment on the claim.

26. It is to be noted that in these passages referred to above, the magistrate did not make a specific finding as to whether the 18 July letter had operated to terminate the contract. Nevertheless, it is apparent from his reasons that he proceeded on the basis that the appellant had complied with general condition 4 and that in the absence of a response to the 18 July letter, that letter operated to terminate the contract, subject of course to the estoppel and/or waiver.

The appeal to the Trial Division

27. The amended notice of appeal focused mainly on the estoppel, whether particular findings were open on the evidence, and the adequacy of the magistrate's reasons. It is not necessary to set out the grounds of appeal, save to note that ground 4 alleged that the magistrate 'erred in finding that the contract of sale had not come to an end once finance had not been obtained and the subject to finance clause had been complied with'. The effect of this ground was to assert that the 18 July letter had terminated the contract (once finance was not obtained), and that the magistrate erred in not so finding. As the judge below stated in his reasons, however, on the appeal to the Trial Division the parties proceeded on the basis that the magistrate had in fact found that the 18 July letter terminated the contract. It followed that the focus of the appeal was whether, having so found, it was open to the magistrate to conclude that the appellant's subsequent conduct estopped him from relying on the termination effected by the 18 July letter.

28. When, after reserving his decision, the judge considered the magistrate's reasons, he formed the view that there was a real question as to whether or not the magistrate had decided the case on the basis that the 18 July letter terminated the contract. As this issue had not been argued on the appeal to the Trial Division, and the judge was concerned not to decide the case on an erroneous basis, he invited further submissions from the parties on the issue. In response, the appellant's counsel submitted that while the magistrate had not made a specific finding that the contract had been terminated by the letter, his reasons assumed that it had been. The respondents' counsel submitted that 'the magistrate appears to have found that the letter of 18 July was in effect a notice of termination'. But the respondents' counsel also raised the question whether, having regard to its terms, the letter automatically terminated the contract. If it did not terminate the contract, he submitted, there was no evidence of any notice terminating the contract and therefore the appellant had simply failed to complete the contract on the settlement date of 15 September, or had repudiated the contract by his letter of 12 September. Counsel submitted that if the judge were to reject his primary submission (namely, that the magistrate's conclusion on the estoppel case was open), the magistrate's decision should nevertheless be upheld on the basis that the letter did not terminate the contract, that there was no evidence of any valid termination of the contract, hence the contract remained on foot and the appellant had simply failed to complete the contract.

29. The judge concluded that the 18 July letter did not terminate the contract. He described the letter thus:

> It was an approach by the purchaser to the vendors to seek an extension of the finance approval clause and, in terms, left with the vendors the option to accept the letter as a notice terminating the contract if the vendors wished to do so. The purchaser tried to 'have his cake and eat it'. The letter did not end the contract and, so, the contract remained on foot.

30. The judge further concluded that the magistrate had proceeded on the basis that the 18 July letter did not terminate the contract. The judge said that this explained why the magistrate considered common law estoppel only, as opposed to equitable estoppel which might have arisen had the contract been terminated. The judge concluded that, in any event, the magistrate's decision could be upheld on the alternative basis suggested by counsel for the respondents, namely that

as the letter did not terminate the contract, the appellant was liable for damages for failure to complete the contract on 15 September, or on the ground of repudiation of the contract by the letter of 12 September. Accordingly, the judge dismissed the appeal.

The appeal to the Court of Appeal

31. The notice of appeal raises seven grounds.

32. Ground 1 contends that the judge erred in finding that the 18 July letter was not a written notice ending the contract.

33. Ground 2 contends that the judge erred in concluding that the magistrate proceeded on the basis that the contract remained on foot.

34. Grounds 3 to 7 attacked the judge's conclusions on the estoppel case. In summary these grounds challenged the adequacy of the magistrate's reasons, the judge's conclusion that common law estoppel was open on the facts, that it was open to the magistrate to consider all forms of estoppel, and the conclusion on estoppel. It is not necessary to set out these grounds.

35. The resolution of the appeal lies in ground 1. At the outset of his submissions, counsel for the appellant identified the central issue as being whether the 18 July letter terminated the contract. Estoppel, he said, was a 'red herring'. If the letter did not terminate the contract, the contract remained on foot and estoppel simply fell away. If, on the other hand, the letter was effective to terminate the contract, no estoppel could arise. Counsel for the respondents similarly identified the issue for determination, namely whether the letter was effective to terminate the contract; that turned on the construction and effect of the terms of the letter. Estoppel, he said, was irrelevant.

36. Accordingly, both counsel focused their submissions on the effect of the 18 July letter. For this purpose it was accepted that all elements of general condition 4 were satisfied, save as to whether the letter was a 'notice ending the contract'.

37. As to that question, counsel for the appellant referred to authorities (to which the judge had not been referred) concerning the proper interpretative approach to a notice of termination.[3] Counsel also referred to *Catley v Watson*[4], where Brooking J described the requirements of a valid notice of rescission under Table A of the *Transfer of Land Act* 1958, as follows:

> [the notice's] terms must be such that a reasonable person, having given it fair and proper consideration, would be left in no doubt as to its meaning. A notice is not unequivocal, in the sense in which such notices are required to be unequivocal in relation to their essential contents, if a reasonable person, having considered the notice as a whole, fairly and properly, might entertain a doubt as to its meaning in relation to some essential matter, even though he would form in his mind a preference for one view, rather than the other of what the notice was intended to convey.[5]

It is to be noted that the reasonable person referred to in *Catley* is not a stranger to the particular transaction, but rather a reasonable person in the position of the recipient of the notice, with the recipient's knowledge of the relevant circumstances of the transaction.[6]

38. Although *Catley* concerned rescission under the *Transfer of Land Act* 1958, counsel referred to the decision as authority to support a more general principle to be distilled from the above cases, namely that in order to be effective, a notice purporting to terminate a contract must do so in clear and unequivocal terms. In my view, that is correct.

39. Counsel for the appellant submitted that the 18 July letter was unequivocal, as it effectively said (to use counsel's words) 'grant us an extension or the contract is at an end'. He submitted that a reasonable person would have understood the letter as ending the contract if, within a reasonable time, an extension was not granted. So clear and unequivocal were the terms of the letter that there could be no doubt as to its true meaning. The fact that there was no activity after the letter until the middle of August was consistent with the contract having ended.

40. On the other hand, counsel for the respondents submitted that the judge's analysis of and conclusion as to the effect of the 18 July letter was correct. That the effect of the letter was

as the judge found was seen in the terms of the last sentence read in light of the terms of general condition 4. The conditional phrase 'in the event that an extension is not agreed to' and the phrase 'you may treat this letter as written notice ending the contract' (emphasis added) passed over to the respondents the decision whether to end the contract. Counsel tested this view of the letter by asking whether the contract was at an end if the respondents did not agree to an extension. As to this, a reasonable reader would note that the letter did not unequivocally say that the contract was ended. Nor was a time stipulated as that within which the respondents should decide on the request for an extension and on the expiration of which (without an agreed extension) the contract was ended. Overall, the letter would be seen as equivocal, and at best for the appellant ambiguous, as to what the appellant intended by it. In short, a reasonable reader of the letter would have been in doubt as to the meaning of the letter.

41. In my view, the judge below was correct to conclude that the 18 July letter was not a 'written notice ending the contract'. The letter did not state that it was a 'notice ending the contract' or that the appellant thereby gave notice to 'end the contract' pursuant to general condition 4, or even that the contract would be terminated if the approval date was not extended. Rather, the letter gave the respondents the option of treating the letter as a written notice ending the contract, in the event the extension was not agreed to. The letter thus left the question of whether the contract was to be ended entirely in the hands of the respondents, at least in the event that they did not agree to the extension. On the other hand, in the event that the respondents did agree to the extension, the letter did not purport to end the contract. It follows that on neither scenario could the letter be regarded as a written notice ending the contract. In my view, it was clear that the meaning of the letter was as stated above, and the judge was correct to conclude as he did.

42. Accordingly, I reject the appellant's submission that a reasonable person would have understood the letter as ending the contract if, within a reasonable time, an extension was not granted. In my view, such a meaning was not open on the terms of the letter, properly construed. But even if it be assumed that such a meaning was possible, the letter equally bore the other possible meaning, namely that it did not end the contract but merely gave the respondents the option to do so. In those circumstances the letter would have been ambiguous as it carried two potential meanings. Thus, the letter could not have operated as written notice ending the contract.

43. I do not overlook the further submission of counsel for the appellant that even if the 18 July letter did not end the contract, the judge below and this Court should not decide the case on such a basis in circumstances where the parties ran their case before the magistrate on a different basis, namely on the assumption that the 18 July letter did end the contract. Further, counsel asserted, the appeals to the Trial Division and to this Court did not challenge the magistrate's (implied) finding that the 18 July letter had ended the contract.

44. I do not accept this submission. It is true, as the judge below stated in his reasons, that the appeal to the Trial Division proceeded on the basis that the magistrate had found that the 18 July letter ended the contract. Nevertheless, on its face ground 4 of the amended notice of appeal below raised the issue of what the magistrate had concluded as to whether the contract remained on foot. That issue was alive before the judge below and in that context, albeit after reserving his decision, the judge raised with the parties the question of the basis on which the magistrate had decided the case. In the course of their further submissions to the judge on that matter, the respondents submitted that the magistrate's decision could be upheld on the alternative basis that the letter had not ended the contract. In effect, the respondents' submission as to the alternative basis required the judge to decide for himself whether the 18 July letter ended the contract. Moreover, counsel for the appellant did not submit to the judge that it was not open to him to consider the proper construction and effect of the letter. It is true that the pleadings did not directly raise the issue, but the issue lay at the threshold of the case, was central to its proper determination and was a question of construction in the context of the facts found. Ground 1 is not made out.

45. As to ground 2, counsel for the appellant conceded that it could not be said that the magistrate made a specific finding that the contract remained on foot. However, counsel said, the tenor of his reasons was a finding that the contract was at an end. In my view, for the reasons I have set out above, I consider that the magistrate proceeded on the basis, encouraged by the parties before him, that the 18 July letter did end the contract. In that sense, the judge below

erred in concluding that the magistrate proceeded on the basis that 'the letter did not end the contract and, so the contract remained on foot'. The difficulty for the appellant, however, is that the judge's error in this regard has no bearing on the correctness of his overall decision that the appeal be dismissed. That is because the judge was correct to dismiss the appeal on the alternative basis suggested by counsel for the respondents, and dealt with under ground 1 above.

46. These conclusions as to grounds 1 and 2 are sufficient to dispose of the appeal. That is because the conclusion that the 18 July letter did not end the contract means, as counsel accepted, that the contract remained on foot at all relevant times, until the appellant wrongfully repudiated the contract by the letter of 12 September and failed to complete the purchase. It follows that the respondents were entitled to the damages they were awarded as loss suffered on the resale consequent upon the appellant's breach of contract. In these circumstances, and as counsel agreed, the alternative plea of estoppel was simply irrelevant. It is thus unnecessary to deal with the grounds which concerned the estoppel case.

47. I would dismiss the appeal with costs.

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[1] Granted by consent orders.
[2] The 8 September fax was not in the Court Book, and counsel agreed that nothing turned on that communication.
[3] *Central Pacific (Campus) Pty Ltd v Staged Developments Australia Pty Ltd* (1998) V Conv R ¶54-575 at 66,902-66,903; *Greydae Pty Ltd v Malilane Pty Ltd* [2003] VSCA 27 at [30]- [35]; [2003] V Conv R 54-680; *Pegela Pty Ltd v National Mutual Life Association of Australasia Ltd* [2006] VSC 507 at [904]- [908]; (2007) 14 ANZ Insurance Cases 90-131; *Champtaloup v Thomas* [1977] 2 NSWLR 264 at 269.
[4] (1983) V Conv R ¶54-003.
[5] (1983) V Conv R ¶54-003 at 62,115.
[6] See *Greydae Pty Ltd v Malilane Pty Ltd* [2003] VSCA 27 at [31]; [2003] V Conv R 54-680.

APPEARANCES: For the appellant Umbers: Mr W Gillies, counsel. Maddens, solicitors. For the respondents Kelson: Mr JD Wilson SC with Mr DW Laidlaw, counsel. Jellie McDonald, solicitors.
