

24/98

SUPREME COURT OF VICTORIA

SIOMOS BROS PTY LTD v AMOCET PTY LTD

Hampel J

3 April, 14 May 1998

CIVIL PROCEEDINGS – CONTRACT FOR SALE OF LAND – SPECIAL CONDITIONS ATTACHED – INTERPRETATION OF – WHETHER REASONABLE BYSTANDER APPROPRIATE TEST – CONDITION INVOLVING “ABSOLUTE DISCRETION” – MEANING OF – SPECIAL CONDITION REQUIRING PURCHASER TO “PROSECUTE AN APPEAL” – MEANING OF.

SP/L entered into a contract with AP/L for the sale of land. Special conditions attached to the contract provided that SP/L obtain a town planning permit on acceptable terms in SP/L's “absolute discretion” and if the permit was not obtained “to make and prosecute an appeal”. SP/L was granted a permit but on terms which were not acceptable. An appeal was lodged but the appeal was later abandoned and settlement between the parties took place. Subsequently, AP/L sued SP/L seeking an amount by way of interest alleged to be due from the date of issue of the permit until the date of settlement. In making the order sought, the magistrate said that in interpreting the provisions of the contract, the court had to consider what a reasonable bystander would have considered the parties' intention to be and that the words “prosecute an appeal” required SP/L to “go to the doors of the Court and commence prosecution”. Upon appeal—

HELD: Appeal allowed. Order quashed.

1. In interpreting the provisions of the contract, the magistrate should have construed the special conditions on their face. It was not correct for the magistrate to ask what a reasonable bystander would have thought the parties' intention was.

2. It was clear from the words of the special conditions that they were to be interpreted in favour of the purchaser SP/L. The decision whether to appeal against a condition of the town planning permit was in its “absolute discretion” and was a matter for SP/L alone.

3. The words “prosecute an appeal” were not to be interpreted to mean that the purchaser SP/L must prosecute the appeal to the door of the Court. There are many situations in which events transpire after the institution of an appeal which result in settlement or a decision to abandon the appeal.

HAMPEL J: [1] This is an appeal from an order of a Magistrate on 15 December 1997, ordering the appellant Siomos Bros Pty Ltd (“Siomos”) to pay \$8,162.19, being interest pursuant to a contract for the sale of land, interest of \$628.48 and costs of \$1,600 to the respondent, Amocet Pty Ltd (“Amocet”). The circumstances leading to the making of the order may be summarised briefly. Siomos entered into a contract for the purchase of land at Tecoma on 8 July 1994. Settlement was to occur “at the expiration of 21 days from the date upon which the last of the events provided for in special conditions 1 and 2 have been satisfied”. Special conditions 1 and 2 provided:—

“1. The purchaser within 4 months of the date of sale (the permit date) obtaining a town planning permit for use of the property as required by it and on such terms and conditions as are in its absolute discretion acceptable to it within the ambit of the relevant provisions of the Shire of Sherbrook planning scheme at the purchaser's cost.

2. If the purchaser fails to obtain a town planning permit as provided for in special condition 1 by the permit date the purchaser may by giving written notice to the vendor's agent on or before seven (7) days after the permit date extend the settlement date under this contract for a period of six (6) months from the date to enable the purchaser to make and prosecute an appeal against a refusal of the relevant municipal authority to grant the town planning permit provided for in special condition 1 or against the terms and conditions of the planning permit which has been granted to the purchaser.”

Special condition 3 allowed the purchaser to bring the contract to an end if it failed to obtain the planning permit. Special condition 4 provided that the special conditions were for the sole benefit of the purchaser. **[2]** In order to develop the land, it was necessary for an easement to be created between the property in question and its neighbouring property. It is a matter of

dispute whether it was agreed between Siomos and Amocet that the easement would be registered before settlement.

Siomos applied for a planning permit and a determination to grant a permit was issued on 21 September 1994. The terms of the permit were not acceptable to Siomos and on 14 October 1994 an appeal was lodged with the Administrative Appeals Tribunal. The grounds of appeal related to a number of issues. First, a condition of the permit required that evidence of the creation of the easement be provided to the Responsible Authority prior to the commencement of the permitted use. Secondly, a condition of the permit required an agreement to enforce parking restrictions over the car park and thirdly, there was an issue regarding the cost of a boundary fence. As at the contract date, the documents creating the easement had not yet been lodged by Amocet's solicitors at the Titles Office. On 27 October 1994, Siomos gave notice to Amocet pursuant to special condition 2, that the date of settlement would have to be extended for a period of six months. On 5 December 1994, the instrument for the creation of the easement was lodged. In January 1995, Siomos abandoned its appeal and settlement of the purchase took place on 18 January 1995.

On 15 May 1997, Amocet filed a complaint in the Magistrates' Court seeking \$8,162.19 on account of interest alleged to be due from the date of issue of the permit to the delayed date of settlement. Amocet alleged that in breach of the contract of sale, Siomos failed to pay the balance of the purchase moneys within 21 days of the date of the issue of the planning permit. The Magistrate considered the interpretation of the words "enable the purchaser to make and prosecute an appeal..." and said that the Court had to consider what a reasonable bystander would have considered the intention of the parties to be. [3] Christos Siomos, in his affidavit sworn 14 January 1998, paragraphs 34 and 35 deposes that:-

"The Magistrate said that the thrust of the condition was to enable the Defendant, who has a serious point of contention in relation to planning matters, that is gross matters, to make use of the section.... He further said the parties did not contemplate the extension in relation to minor matters that could probably be resolved. He found that the word "prosecute" ought to be interpreted in the sense that it requires the Appellant to go to the doors of the Court and commence the prosecution."

The Magistrate found that the appeal in relation to the easement was not appropriate in all the circumstances and that the appeals regarding the fence and car parking conditions were not *bona fide*. Mr Kaufman QC, who appeared before me for Siomos, submitted that Siomos was entitled to delay settlement pursuant to special condition 2 when it appealed against some of the terms and conditions of the planning permit. Mr Kaufman argued that the special conditions in the contract of sale must be construed on their face, and that the question of what a reasonable bystander would have inferred is not relevant. He relied on the judgment of Fullagar, Smith and JD Phillips JJ in *Australian Paper Manufacturers v American International* [1994] VicRp 48; [1994] 1 VR 685, 690-1; (1993) 7 ANZ Insurance Cases 61-191 for the proposition that "...the proper approach to a case of this kind is first to examine the words of the contract and then to construe them in accordance with ordinary rules of construction if rules of construction become necessary."

Mr Kaufman submitted that special condition 1 is clear and unambiguous in that the planning permit required by the purchaser is "on such terms and conditions as are in [the purchaser's] absolute discretion acceptable to it within the ambit of the relevant provisions of the Shire of Sherbrook planning scheme". When Siomos obtained the planning permit, and it was not satisfied, in its absolute discretion, with the terms and conditions of the permit, and it gave proper notice in accordance with special condition 2 of the Contract of Sale, then it was entitled to extend the settlement date, to enable it to prosecute an appeal. Mr Kaufman argued that special condition 4 makes it clear that the mechanism provided for by special conditions 1,2 [4] and 3 is for the sole benefit of the purchaser. He relied on the judgment of Sheller JA in *Topfelt Pty Ltd v State Bank of New South Wales & Anor* (1993) NSW ConvR 1155-676 in which his Honour said:-

"To my mind the expression "may in its absolute discretion" is a composite one which emphasises the agreement of the parties that the decision of the mortgagee as to which of the various powers set out in clause 18.2, if any, it will exercise, is a matter for it and it alone."

Although this was a case in which the right of a mortgagee to exercise its power of sale was in issue, Mr Kaufman argued that it is analogous with the present case in that the purchaser's acceptance or rejection of the conditions of the permit is unfettered. Further, Mr Kaufman argued

that the words "enable the purchaser to make and prosecute an appeal" do not mean that the appeal must be prosecuted to the door of the Court. He argued that it is an enabling provision. Whether the appellant decides to settle or abandon the appeal at a later stage, for whatever reason, does not determine its character as an "appeal".

Mr Johnson, who appeared on behalf of Amocet, submitted that by failing to pursue the appeal to its ultimate conclusion, Siomos failed to "prosecute" the appeal. He relied, however, on his submission that in any event, at no stage of the process, was this really an appeal. Mr Johnson argued that the subject matter of the appeal, that is, the issue of the easement, fence and car park, were not properly matters that fell within the ambit of the planning scheme. The lodgment of the appeal was simply a mechanism by which Siomos delayed payment of the balance of the purchase price, whilst negotiating matters of a conveyancing nature. Mr Johnson submitted that the words "in its absolute discretion" should be governed by what is properly the subject matter of an appeal in the context of the planning scheme. He argued that the Magistrate was entitled to look at the relevant correspondence and draw the inference that Siomos was simply attempting to extend the settlement date, rather than to prosecute a genuine appeal pursuant to the relevant special conditions.

[5] In my view, the special conditions in the Contract of Sale should be construed on their face, and I do not think that it is correct to ask what a reasonable bystander would have thought the parties' intention was. It is clear from the wording of the special conditions, that they are to be interpreted in favour of the purchaser.

I do not agree with Mr Johnson that the words "in its [the purchaser's] absolute discretion", are to be governed by what may be regarded as serious or "gross" matters. There is nothing in the wording of the special conditions to suggest this. The decision whether to appeal against a condition of the permit is a matter for Siomos and Siomos alone. Mr Johnson relied on the addition of the words "within the ambit of the relevant provisions of the Shire of Sherbrook Planning scheme" to argue that the matters contested in the notice of appeal did not fall within the ambit of the scheme. I do not think this is so. The permit condition regarding registration of the easement was one with which Siomos could not comply on the date the permit was granted, because the instrument creating the easement had not been lodged for registration by Amocet's solicitors. It is a condition of the permit which was not acceptable to Siomos "in its absolute discretion".

I do not think that the words "enable the purchaser to make and prosecute an appeal..." are to be interpreted to mean that the purchaser must prosecute the appeal to the door of the Court. There are many situations in which events transpire after the institution of an appeal, that result in settlement or a decision to abandon the appeal. This does not mean that the appeal was not genuine when instituted. I think this is so in the present case.

As a secondary position, Mr Kaufman submitted that Amocet warranted that the easement would be registered prior to settlement. In my view, the critical issue is not whether Amocet warranted that the easement would be registered before settlement, but that Siomos was entitled, in its absolute discretion, to be dissatisfied with the conditions of the planning permit.

Accordingly, I find in favour of the appellant. The appeal is allowed with costs. The order of the Magistrate is quashed.

APPEARANCES: For the appellant: Mr J Kaufman QC, counsel. Patrick Hartl & Associates, solicitors. For the respondent: Mr CD Johnson, counsel. Paul P Seddon, solicitors.