47/87

SUPREME COURT OF VICTORIA

READING and ANOR v DAMM and ANOR

Southwell J

23 June 1987

SALE OF LAND – CONTRACT SUBJECT TO FINANCE APPROVAL ON OR BEFORE CERTAIN DATE – DELAY IN INTERVIEW FOR LOAN APPLICATION – DATE EXTENDED BY AGENT – LOAN APPLICATION SUBSEQUENTLY REFUSED – WITHDRAWAL FROM CONTRACT BY PURCHASERS – WHETHER TIME OF ESSENCE – WHETHER CONTRACT BECAME UNCONDITIONAL – WHETHER PURCHASERS ENTITLED TO RETURN OF DEPOSIT – WHO SHOULD BEAR COSTS.

On 12 July, R. ('purchasers') agreed to buy a house from D ('vendors'). The sale note contained a special condition that the sale was subject to the purchasers' obtaining approval of finance on or before 1 August. Delay occurred in the purchasers' applying for the loan and the earliest time arranged for an interview for the loan approval was 4 August, three days after expiry of the date contained in the special condition. On 29 July, the purchasers told the estate agent about the delay who gave an extension of time; subsequently, this extension was ratified by the vendors' solicitors. The parties continued to take the steps necessary to complete the contract of sale; however, on 21 August, the purchasers were notified that their loan application had been unsuccessful. The purchasers notified the vendors' solicitors of this on 25 August and indicated that they wished to determine the contract. On 28 August, the vendors' solicitors declared that the sale was to proceed unconditionally, served notice of rescission and claimed the right to retain the deposit monies less certain expenses. On an originating motion seeking return of the whole of the deposit monies paid—

HELD: Whole of deposit monies to be returned to the purchasers. Each party to bear their own costs.
(1) In view of the special condition, time had been of the essence but it ceased to be when an extension of time for an unspecified period was granted by the estate agent.
***Carr v JA Berriman Pty Ltd* [1953] HCA 31; (1953) 89 CLR 327, referred to.**

(2) As the vendors did nothing effectively to restore the condition that time was of the essence, it was not open for them unilaterally to declare that the contract of sale had become unconditional. Accordingly, the purchasers were never in breach of the contract and were entitled to a return of the deposit monies paid.

(3) As there was fault on both sides, costs to be borne by the party incurring them.

SOUTHWELL J: [1] This is a vendor-purchaser summons pursuant to s49(1) of the *Property Law Act* 1958. It is necessary first, pursuant to Rule 45.05(2), to dispense with the requirements of Rules 5.03(1) and 8.02 and to authorise the plaintiffs to proceed by originating motion. On 12 July 1986 the plaintiffs executed a sale note whereby they offered to purchase a house at 146 Stawell Street, Burnley, for the sum of $70,000, payable as to $7,000 by way of deposit, balance at the expiration of sixty days from 12 July. The deposit was paid on that day. On 21 July 1986 the offer was accepted by the vendors/defendants. The estate agent who effected the sale was **[2]** Gil Williams & Co., the relevant employee being Mr Martyn Toogood. The sale note contained a special condition, the construction of which forms one of the issues in these proceedings. It provides:

> "This sale is conditional upon the Purchaser obtaining on or before the First day of August 1986 (hereinafter called the approval date), approval of a first mortgage loan of not less than Fifty Nine Thousand dollars ($59,000) from the Ministry of Housing on its usual terms and conditions on the security of the property hereby sold. The Purchaser agrees to apply for such a loan forthwith and to do all acts reasonable and incidental to the obtaining of such a loan and to attend to all the requirements of the Ministry of Housing. If the Purchasers do not advise the Vendors' Solicitors in writing within the aforesaid 21 day period that they have not obtained approval of the said loan then this shall not apply to this Contract."

It should at once be observed that the terminology of that special condition does not lie comfortably with the sale note, which contains no reference to a 21 day period, and accordingly tends to make nonsense of the words "the aforesaid 21 day period". Secondly, the sale note makes

no reference to the identity of the vendors' solicitors. A disputed issue of fact which cannot be decided on these proceedings is whether Mr Toogood told the purchasers of the identity of the vendors' solicitors. For reasons which will become apparent, this is not of significance.

The purchasers did not "forthwith" apply to the Ministry of Housing for the loan: they waited until they were informed on 21 July that their offer to purchase had been accepted. On about 29 July the purchasers were advised that pressure of work in the Ministry would delay the first **[3]** interview for a loan application until 4 August. The purchasers on 29 July telephoned Mr Toogood to seek an extension of time for the obtaining of finance. Mr Toogood told the purchasers that there would be no problem about that, but that their request should be put in writing. The male plaintiff immediately did as he was bid, by letter dated 30 July, hand delivered to the agent on 31 July. It read:

> "Due to a large number of applications at the Ministry of Housing, the earliest time we can have our interview for loan approval is Monday 4th August. This now forces us to apply for an extension of time on our approval date."

The agent did not until 3 September send a photocopy of that letter to the vendors' solicitors: his failure to do that, as it seems to me, has been the catalyst for this litigation. However, much had happened in the meantime. On 4 August, the date upon which the purchasers had their first interview with the Ministry of Housing, Mr Reading spoke to Mrs Huisman, a law clerk in the employ of the vendors' solicitors. There can he no doubt that in the conversation the latter was made well aware that no decision had yet been reached about the availability of loan monies from the Ministry of Housing: in the absence of detailed evidence from the participants in that conversation, I would infer that Mr Reading told Mrs Huisman, as was the fact, that the granting of the loan was dependent upon a valuation by the Ministry, which would not take place until later in August. Mrs Huisman, in an affidavit filed on the morning of 22 June, that is, the day the hearing before **[4]** me commenced, said:

> "3. On the 4th day of August, 1986 I telephoned the Plaintiffs for the purpose of advising them that formal confirmation of loan approval was required to be provided to our Office. I spoke to the second-named Plaintiff, who advised that a valuation had yet to be done by the Ministry of Housing. I advised the second-named Plaintiff that the Contract of Sale had become unconditional and again requested that formal confirmation of loan approval be provided. The second-named Plaintiff confirmed that this would be done as soon as possible."

If that was said, and it is impossible in these proceedings to decide the point, it was certainly not understood by Mr Reading, and the subsequent conduct of both parties tends to make it unlikely, at first sight, that any such statement had been made or at least understood. In early August the purchasers, who had intended not to engage a solicitor, in fact engaged Mr Czarnecki to act for them on a set fee of $199 plus disbursements with a term of the engagement that all negotiations relating to the obtaining of finance were to be conducted by the purchasers themselves. Thus it was that when Mr Czarnecki wrote to the vendors' solicitors on 8 August enclosing requisitions on title, no mention was made of the special condition or the obtaining of finance. On 12 August the vendors' solicitors replied by letter which, *inter alia*, stated:

> "In the meantime, we enclose herewith Section 27 Certificate for signature by your clients upon formal confirmation of approval of their finance."

It is clear from that letter that the vendors' solicitors then knew that approval of the loan had not then been granted. **[5]** On 18 August the vendors' solicitors again wrote to Mr Czarnecki:

> "re: Damm & Steiner to Reading, Ppty: 146 Stawell Street, Burnley.
> We refer to the above and to our telephone attendance of the 15th August 1986. We look forward to confirmation of your client's approval of finance. We note from the Contract Note that the same was due on or before the 1st day of August 1986. We now enclose herewith Vendors' Answers to the Purchaser's Requisitions on Title and look forward to return of the duly executed Section 27 Certificate forwarded under our cover letter of the 12th August, 1986."

Strangely enough, the affidavits filed make no reference to the telephone conversation of 15 August. In the absence of evidence to the contrary I would infer that the fact that no approval of finance had yet been obtained was mentioned. However, on 21 August the Ministry of Housing

valued the subject property at something less than would enable a loan of $59,000 to be granted, the Ministry rule being that the loan must not exceed 95 per cent of the valuation.

On 25 August, the purchasers advised Mr Czarnecki that their loan application had been unsuccessful. Mr Czarnecki informed the vendors' solicitors of this and said that the purchasers wished to determine the contract. On 28 August the vendors' solicitors wrote to Mr Czarnecki as follows:

> "re: Damn and Steiner to Reading Ppty: 146 Stawell Street, Burnley.
>
> We refer to the above matter and to our telephone attendance of the 25th August, 1986.
>
> **[6]** We also refer to our subsequent urgent telephone message for your office to contact this office on the 26th August, 1985 wherein it was our intention to further discuss the attitude of the Ministry of Housing Regarding the valuation. We note the Special Condition of the Contract Note that written advice was to be provided to the Vendor's Solicitors within 21 days from the 12th day of July 1986 namely the 1st day of August 1996 advising that approval of finance had not been obtained. We did not receive such written advices either to say the loan had been approved or a request for an extension for approval of the same. We note receipt of your Requisitions on Title dated the 8th day of August 1986. Again no notification was contained therein regarding the purchaser's finance. Our clients instruct that the Purchasers were granted a few days' extension for approval of the finance due to the Ministry of Housing not having completed their valuation of the property. We understand from the Agent that such valuation was not carried out until the 21st August 1986 this well exceeding the period of the granted extension. We have discussed this matter with our clients who advise and we hereby confirm, that the terms and conditions of the Contract Note dated the 21st day of July 1986 and executed by all parties, will now be strictly adhered to and accordingly, the above sale will proceed unconditionally. We confirm that the Agents are in receipt of the full deposit monies of $7,000.00."

In due course, the vendors' solicitors went through the motions of arranging settlement, and then served notice of rescission. They thereafter claimed the right to retain the whole of the deposit, but made an *ex gratia* offer to repay $3,064.58, being the $7,000 deposit less the following claimed expenses:

> "(a) Mortgage payments to RESI - Statewide Building Society $2,339.32
>
> (b) Real Estate Agents' advertising fees $311.10
>
> (c) Costs and disbursements of the Defendants owing to our office on the sale $535.00.
>
> **[7]** (d) Costs and disbursements of the Defendants owing to our office on the Notice of Rescission $150.00.
>
> (e) Costs incurred to the Defendants regarding bridging finance incurred exceeding the following amount but this being what the Defendants were prepared to accept - $600. The total being $3,935.42."

Mr Fleming went on to say in his affidavit, "Accordingly, the Defendants were prepared to reimburse to the Plaintiffs the sum of $3,064.58." But eventually that sum was paid to the purchasers' solicitors who held it but did not accept it in full settlement of the claim. Hence this litigation. For the purchasers, Mr Foxcroft submitted that the giving of the written notice to the agent on 31 July constituted compliance with the special condition. If it did not, then in any event the special condition was vague and uncertain. Then it was said that while originally time was of the essence of the contract (by a somewhat circuitous route not here necessary to trace the Conditions of Table A of the 7th Schedule of the *Transfer of Land Act* 1958 applied), the conduct of the vendors in allowing the time for compliance with the special condition to pass, and their conduct thereafter in discussing and corresponding about the question whether approval of the loan might or might not be forthcoming, led to the conclusion that time was no longer of the essence, and that between the original due date and 25 August, when Mr Czarnecki told the vendors' solicitors that the loan application had been rejected and the purchasers wished to withdraw, the vendors had done nothing effectively to restore **[8]** the condition that time was of the essence. Accordingly, it was said the conditional contract never become unconditional.

Mr Foxcroft submitted that once there had been an extension of time no new time for compliance with the special condition had ever been fixed (see *Barclay v Messenger* (1874) 30 LT

351; (1874) 43 LJCh 449). He further submitted that the reference in the correspondence to "a further few days" shows that there was indeed an agreement to an extension of time, that there had been ratification of the agent's act, as evidenced by the negotiations and correspondence, and particularly the letter of 28 August. Furthermore, it was submitted that the use of the "now" in that letter amounted to an acknowledgment that hitherto time was not of the essence, but by then it was too late because the purchasers had withdrawn on 25 August.

For the vendors, Mr Maxwell spent some little time in arguing that the special condition was not uncertain, that the requirement of notice to the solicitors was clear and binding that the contract made no provision for an extension of time, that the agent had no actual or ostensible authority to vary the terms of the contract, and no representation had been made by the vendors as to the agent's authority. This might all be accepted, but as I understood Mr Maxwell finally to concede, the fact is that the agent's act in purporting to agree to an extension of time was ratified by the vendors' solicitors.

The letter of 28 August makes that clear; an extension of time was granted. However, there is no evidence **[9]** that the extension was granted for only "a few days". I here repeat part of the letter of 28 August where the solicitors for the vendors says:

> "Our clients instruct that the Purchasers were granted a few days' extension for approval of the finance due to the Ministry of Housing not having completed their valuation of the property. We understand from the Agent that such valuation was not carried out until the 21st August, 1986 this well exceeding the period of the granted extension."

Since there is no evidence from the vendors themselves, one must infer, as again I thought Mr Maxwell felt bound to concede, that the agent had granted an extension. But the agent does not say he granted an extension of "a few days". The material raises no disputed question of fact about that – there is simply no evidence that any time limit was put upon the admitted extension. I have been troubled by the submission of Mr Maxwell that there are disputed questions of fact in these proceedings which are incapable of resolution here, and that the appropriate procedure would have been for the purchasers to sue in the Magistrates' Court for money had and received. That proceedings such as this are not appropriate for the trial of disputed questions of fact is clear (see *Halsbury* 4th ed. Vol. 42 para. 230). And yet, on close analysis, I do not think that the disputed questions of fact need to be resolved to enable me to answer the questions in the summons.

As I have said, there is no disputed question whether the agent said that the extension would be for " a few days" – there was simply an extension of time to enable the purchasers to press on with their application for a loan. **[10]** The next question is whether the affidavit of Mrs Huisman as to the conversation on 4 August raises a disputed question of fact which must be resolved to enable the Court to reach a conclusion in these proceedings, but which cannot now be resolved, or whether even if her evidence be now entirely accepted, nevertheless the contract remained conditional. I have already set out her version of the conversation. In my opinion it was not in law open to the vendors' solicitors unilaterally to declare that "the Contract of Sale had become unconditional". Time had been of the essence; it ceased to be when an extension of time for an unspecified period was granted. In *Carr v JA Berriman Pty Ltd* [1953] HCA 31; (1953) 89 CLR 327, Fullagar J said, at p348:

> "'Where a contract contains a promise to do a particular thing on or before a specified day, time may or may not be of the essence of the promise. If time is of the essence, and the promise is not performed on the day, the promisee is entitled to rescind the contract, but he may elect not to exercise this right, and an election will be inferred from any conduct which is consistent only with the continued existence of the contract. If time is not of the essence of the promise, the promisee is not entitled to rescind for non-performance on the day. If either (a) time is not originally of the essence or (b) time being originally of the essence, the right to rescind for non-performance on the day is lost by election, the promisee can, generally speaking, only rescind after he has given notice requiring performance within a specified reasonable time and after non-compliance with that notice."

It is to he observed that Mrs Huisman spoke in the past tense – the contract had become unconditional". Doubtless it would have been open to the vendors' solicitors to have served a notice fixing a new time before which the purchasers **[11]** could serve a notice as contemplated by

the special condition. But that was not done on 4 August. The question then is whether any act subsequent to 4 August and before the purchasers purported to withdraw from the contract on 25 August or perhaps, on one view of the evidence, before the letter of the purchasers' solicitors of 29 August can be said to have refixed time. As I understood him, Mr Maxwell did not submit that the letters of either 12 or 18 August so operated. In my opinion, they clearly did not. Indeed, an examination of those letters tends to confirm that the contract was at that time and was understood by the parties to be still conditional. The letter of 12 August speaks *in futuro* of "formal confirmation of approval" of the loan. The letter of 18 August refers to a telephone conversation of 15 August and, as I have said, there is no direct evidence of that conversation: but the clear inference is that Mr Czarnecki must have told the vendors' solicitors that approval had not yet been granted. It would be surprising if they were not also told that the valuation was not to take place until 21 August.

Accordingly, I am of opinion that the contract had not before 25 August become unconditional. The purchasers were entitled to withdraw. Even if it be held that there was no effective withdrawal on 25 August (counsel made no submissions on this point), the letter of 29 August from Mr Czarnecki to the vendors' solicitors exercised the right to withdraw. That right was still alive for the reason that the letter of 28 August suffers from the same defect as the **[12]** conversation of 4 August – it did not fix or purport to fix an extended time within which the purchasers could avail themselves of the right granted by the special condition.

It follows that the purchasers were never in breach of the contract and are therefore entitled to a return of the whole of the deposit monies paid. I should observe that I have some sympathy for the vendors' solicitors, who were placed in a difficult position by reason of the failure of the agent to disclose the nature of the conversations he had with the purchasers, and the fact of the receipt of the letter dated 30 July. This was compounded by the failure of Mr Czarnecki to refer to the extension of time in his letter of 8 August. If either of these necessary steps had been taken this litigation would probably have been avoided. Mr Czarnecki should have seen to it that there was no room for misunderstanding. This matter is relevant and important on the question of costs. The questions in the summons and the answers are as follows:

> "(c) (i) Did the contract note dated 21st July 1986 become unconditional on: (x) 1st August 1986?" Answer: "No".
> "(y) any other and what date thereafter?" Answer: "No."
> (ii) Was the contract properly determined by the purchasers on: (x) 25th August 1986?" Answer: "Yes, or alternatively it was properly determined on 29 August, 1986."
> **[13]** (iii) Was the contract properly determined by the Vendors on 10th October, 1986?" Answer: "(d) Relief against forfeiture of deposit? (The question, by leave, having been amended to omit reference to section 49(2) of the *Property Law Act* 1958.) Answer: "The vendors are ordered to pay to the purchasers the balance of deposit, namely $3,935.42."

I shall hear counsel on the questions of costs and interest. (Discussion ensued.) The jurisdiction granted by s49(1) confers a wide discretion which, of course, must be exercised judicially. It is impossible in proceedings such as this to make any exact allocation of blame. I have said that the agent for the vendors was much at fault, so, I believe, also was the then solicitor for the purchasers. In my view, the justice of the matter demands that the loss of interest on the money should lie where it falls and the costs should be borne by he who incurs them. I shall make no order.
