

36/11; [2011] VSC 504

SUPREME COURT OF VICTORIA

PELUSO v SAFI

Osborn J

29 September 2011

CIVIL PROCEEDINGS – CONTRACT – SALE OF LAND – CONTRACT SIGNED BY VENDOR AFTER DATE FOR PAYMENT OF DEPOSIT AND DATE BY WHICH PURCHASER ENTITLED TO TERMINATE CONTRACT ON GROUNDS OF LACK OF FINANCE – WHERE PURCHASER UNABLE TO OBTAIN FINANCE – RESCISSION – NO SUPERVENING EVENT IDENTIFIED – FUNDAMENTAL UNCERTAINTY AS TO PURCHASER’S RIGHTS AND OBLIGATIONS UNDER THE CONTRACT – WHERE PARTIES’ INTENTION CANNOT BE ASCERTAINED – OFFER LAPSED AFTER A REASONABLE PERIOD OF TIME – OFFER INCAPABLE OF BEING ACCEPTED – APPEAL DISMISSED.

P. purported to sell land to S. and a form of contract for purchase was executed between the parties. The contract was signed by a purported attorney under power on behalf of P. on 17 March 2010; however, it appeared that P. was the purchaser of the land from a company in liquidation. This fact prevented S. from obtaining finance for the purchase. As a consequence of the effluxion of time, this rendered S.’s offer incapable of acceptance. P. sued S. for forfeiture of the balance of the deposit payable. This claim was dismissed by the Magistrate. Upon appeal—

HELD: Appeal dismissed.

1. The terms of the contract made time of the essence and required an initial deposit to be paid upon the signing of the contract and payment of the balance on 9 March 2010.

2. It was not open to the vendor P. to accept the offer on 17 March 2010 as:

(a) The offer comprised in the documents signed by the S. comprehended sequential obligations intended to commence with the conclusion of the contract by acceptance of the offer before 9 March 2010.

(b) There was fundamental uncertainty as to what, if any, was the obligation of S. to pay the deposit if the contract was not concluded before that date. Having regard to the dates for payment, this required payment before the contract was entered into. As pleaded, the statement of claim contained no allegation that a deposit was payable at all.

(c) There was a fundamental uncertainty as to S.’s rights, if any, under the special condition pursuant to which he made the offer to purchase. The evidence showed that no finance was ultimately able to be obtained for the proposed purchase, but the effect of the special condition was both nugatory and/or fundamentally uncertain upon the purported date of acceptance of the offer, namely 17 March 2010. This is because the two days’ notice provided for in General Condition 14 expired on 10 March 2010, before the contract was allegedly entered into. The delay by the vendor P. thus deprived S. of any opportunity to take advantage of the special condition strictly in accordance with its terms.

(d) Where no date for lapse was specified in an offer, it was deemed to lapse unless accepted within a reasonable time. Such time could not extend beyond a date which gave S. a reasonable opportunity to exercise an unqualified right under Condition 14. That date was necessarily some time prior to the approval date specified in the contract.

3. Accordingly, the contract upon which P. purported to sue was not in fact effected by the purported execution of the document by his attorney on 17 March 2010.

OSBORN J:

1. Mr Peluso has appealed the decision of a Magistrate refusing a claim for forfeiture of the balance of a deposit payable under a contract for sale of land, together with incidental costs and interest. The appeal is brought under s109 of the *Magistrates’ Court Act* 1989, and is restricted to questions of law.

2. Mr Safi, the respondent, appeared before the Magistrate in person as he has done before me. That course has led to some confusion of what, on analysis, I am persuaded are the true issues between the parties.

3. Mr Safi executed a form of contract for purchase of Lot 232 Victoria Place, Pakenham, on 22 February 2010. The provisions for lapse of offer contained in the document were, it appears, deleted by the placing of a line through the following words:

This offer will lapse unless accepted within [blank] clear business days (three days if none specified)

4. I say it appears this provision was deleted because the deletion was not initialled, and no oral evidence was given as to when the deletion occurred.

5. The contract was subsequently signed by a purported attorney under power on behalf of Mr Peluso on 17 March 2010 and such signature was, it appears, communicated to Mr Safi. A power of attorney was not produced to the Magistrate, but oral evidence was given that it had been executed.

6. An examination of the document comprising the alleged contract reveals two problems. First, the statement required by s32(1) of the *Sale of Land Act* 1962 ('Sale of Land Act') purports to satisfy s32(3)(b) by attaching a copy contract under which Mr Peluso is the purchaser of the land from Anbero Enterprises Pty Ltd ('Anbero'). That contract was due for completion on 7 September 2009 and accordingly on its face did not give Mr Peluso enforceable rights to on-sell the property as at 17 March 2010.

7. Further, the evidence before the Magistrate showed that at least by 17 March 2010 Anbero was in liquidation. Indeed, Mr Peluso candidly told the Magistrate that it was for this reason that the land was sold to him.

Question: Mr Safi has already raised the issue of what happened with the company that previously owned the land. Could you inform the court what the situation was?

Answer: It was just a company that was used that went into liquidation and on advice from our advisors they told us to nominate it into another entity which we did.

Question: The other entity was?

Answer: Myself.

8. The fact that Anbero was in liquidation in due course prevented Mr Safi from obtaining finance for the purchase, a matter to which I shall return.

9. In my view, however, there is a more fundamental problem inherent in the contract documentation. The terms of the contract make time of the essence. They require an initial deposit to be paid upon the signing of the contract, which must mean the signing by both parties, and the payment of the balance of the deposit on 9 March 2010, with \$160,740 payable at settlement on 23 April 2010. The contract was further subject to a handwritten special condition which stated:

LOAN - GC.14 applies
LENDER - An approved financial institution
LOAN AMOUNT - \$142,900.00 (not less than)
APPROVAL DATE - 8th March 2010

10. General Condition 14 provides:

14.1 If the particulars of sale specify that this contract is subject to a loan being approved, this contract is subject to the lender approving the loan on the security of the property by the approval date or any later date allowed by the vendor.

14.2 The purchaser may end the contract if the loan is not approved by the approval date, but only if the purchaser:

- (a) immediately applied for the loan; and
- (b) did everything reasonably required to obtain approval of the loan; and
- (c) serves written notice ending the contract on the vendor within two clear business days after the approval date or any later date allowed by the vendor; and
- (d) is not in default under any other condition of this contract when the notice is given.

14.3 All money must be immediately refunded to the purchaser if the contract is ended.

11. In my view, it was not open to the vendor to accept the offer on 17 March 2010 as:

(a) The offer comprised in the documents signed by the purchaser comprehended sequential obligations intended to commence with the conclusion of the contract by acceptance of the offer before 9 March 2010.

(b) There was fundamental uncertainty as to what, if any, was the obligation of the purchaser to pay the deposit if the contract was not concluded before that date. It is perhaps not coincidental that Mr Peluso's amended statement of claim deletes the allegation made in the original claim that 'A deposit of \$17,860 was to be paid by the purchaser, of which \$500 was paid, and the balance of \$17,360 was to be paid by 9 March 2010'. This would require payment before the contract was entered into. As now pleaded, the statement of claim contains no allegation that a deposit was payable at all. It is not possible for the Court to ascertain dates upon which the parties must have intended the sequential obligations would take effect.^[1] Mr Warren submitted to me that Mr Peluso could have demanded payment of the deposit upon giving reasonable notice of say 14 days after 17 March 2010. This is not what was pleaded below, and it illustrates the uncertainty to which I refer. There is, in turn, a difficult question, which I do not need to decide, as to whether there is a deposit capable of forfeiture, if in fact no deposit was payable.

(c) There was also a fundamental uncertainty as to the purchaser's rights, if any, under the special condition pursuant to which he made the offer to purchase. The evidence shows that no finance was ultimately able to be obtained for the proposed purchase, but the effect of the special condition was both nugatory and/or fundamentally uncertain upon the purported date of acceptance of the offer, namely 17 March 2010. This is because the two days' notice provided for in General Condition 14 expired on 10 March 2010, before the contract was allegedly entered into. The vendor's delay thus deprived the purchaser of any opportunity to take advantage of the special condition strictly in accordance with its terms. Mr Warren has submitted to me at para 19 of his written submissions, 'General Condition 14 does not assist Mr Safi. The parties certainly contemplated that the contract would be subject to finance. However Mr Safi could not have relied upon the General Condition to save his liability to pay the deposit because he did not have the benefit of G[eneral] C[ondition] 14 at any time after March 8.' This submission demonstrates that Mr Peluso did not accept the offer on the terms on which Mr Safi made it, namely that Mr Safi could seek finance in respect of the concluded contract by a specified date, and the purchase was conditional upon loan approval.

(d) Where no date for lapse is specified in an offer, it is deemed to lapse unless accepted within a reasonable time.^[2] In my view, such time could not extend beyond a date which gave Mr Safi a reasonable opportunity to exercise an unqualified right under Condition 14. That date was necessarily some time prior to the approval date specified in the contract. Mr Warren submitted that the offer could have been accepted at any time prior to 23 April 2010. I do not accept that this is correct. Such a construction would be entirely unreasonable.

12. It follows that no contract was in fact concluded on 17 March 2010 and the claim must fail. Mr Safi's defence to the original statement of claim filed in the matter expressly raised the sequential dates to which I have referred and the fundamental inconsistency between them, and the proposition that the contract was entered into on 17 March 2010. It went on to say:

By reason of the matters alleged in paragraph 2 the performance of the contract of sale became impossible without fault on the part of the defendant and the contract of sale was frustrated and the defendant discharged from further performances of the contract of sale.

13. In my view, the consequence of the effluxion of time upon which Mr Safi relies is more properly characterised as rendering the offer incapable of acceptance rather than as frustrating the contract. He was, however, entitled to rely upon the fact that the performance of the contract was impossible in accordance with the terms of his offer as at the date on which it was purportedly accepted as demonstrating the offer had lapsed.

14. Mr Warren submitted that Mr Safi had admitted the contract was concluded by his defence in the Magistrates' Court. Mr Safi did not, however, deliver a defence to the amended statement of claim on which Mr Peluso proceeded in the Magistrates' Court. Further, he himself did not purport to define the issues for the Magistrate, other than by giving evidence and presenting argument as to the course of events which occurred. Mr Warren himself conveyed to the Magistrate the substance of some discussion with Mr Safi's former solicitor, but I do not regard Mr Safi to have pleaded in a strict sense to the amended statement of claim. I am satisfied that the effect of the sequence of dates to which I have referred was raised before the Magistrate and that it was in any event plainly demonstrable from the contract document upon which Mr Peluso has sued. In

these circumstances, the Court must recognise and not ignore its patent deficiency.

15. Mr Warren next submitted that Mr Safi had 'affirmed' the contract. He agreed, however, that the evidence shows no more than that after the late purported acceptance of the offer Mr Safi, in effect, said, 'I will go ahead if I can get finance.' This was not an affirmation of the strict terms of the contract upon which Mr Peluso relies. Mr Peluso wishes to both assert that the terms of the contract mean that Mr Safi could not rely on the failure to obtain loan approval and simultaneously rely upon the fact of Mr Safi's pursuit of finance after 17 March 2010. There is an inherent incompatibility and contradiction in this position.

16. Mr Peluso has sued in reliance upon the strict terms of the document executed on his behalf on 17 March 2010. His case on that document must fail.

17. The conclusions I have reached are sufficient to dispose of the appeal, but it is desirable that I say something further about the parties' positions and the decision of the Magistrate.

18. Mr Safi's evidence was that his conveyancer sought an extension of time from the vendor to obtain finance for the proposed purchase and this was agreed to. The finance was, however, refused because Anbero was in liquidation and the sale to Mr Peluso, who was a director of Anbero, was potentially open to challenge.

19. Mr Safi said that when the refusal of finance was communicated to the vendor's solicitors, it was agreed that the proposed purchase should not proceed. The evidence of discussions between the conveyancer and the solicitors was rejected by the Magistrate as hearsay. The Magistrate found, however, that the contract was frustrated by the fact that Anbero was in liquidation. There are, I accept, as Mr Warren submitted, some fundamental problems with this conclusion.

20. It is sufficient for present purposes to state the first of them, namely that the liquidation was not shown to have occurred after the contract was purportedly entered into. Frustration is premised upon the notion of a supervening event. The doctrine was recently considered by the Court of Appeal in the case to which Mr Warren referred me, *oOh! Media Roadside Pty Ltd (formerly Power Panels Pty Ltd) v Diamond Wheels Pty Ltd*.^[3]

21. The Magistrate also dismissed a counterclaim alleging breach of s32(2) of the *Sale of Land Act*. The apparent breach of s32(3)(b), which I have identified was not ventilated. I do not presently see how the failure to disclose that Anbero was in liquidation as at the date of contract could be regarded as reasonable in terms of s32(7), particularly given the circumstances in which Mr Peluso acquired his interest, and the potential applicability of s172 of the *Property Law Act* 1958. Nor do I see how it could be said Mr Safi was put in as good a position as if the requirements of s32(3)(b) were complied with.

22. Nevertheless, I accept, firstly, that s32 was not raised by way of a defence as distinct from a counterclaim, and this gives rise to potential jurisdictional issues of the type Mr Warren identified before the Magistrate; secondly, that Mr Peluso has not had the s32(3)(b) point raised against him at all, prior to the hearing before me; and thirdly, that he has not had the opportunity to present such evidence as might possibly be available to him in terms of the discretion available under s32(7).

23. It follows that despite what I have said about s32(3)(b), it is plain that Mr Peluso has not had a fair or full hearing with respect to its application, if any, to the facts here in issue.

24. Nevertheless, the s32 considerations suggest that even if I were not persuaded that there is a fundamental defect in Mr Peluso's claim, the rejection of the Magistrate's findings as to frustration would not necessarily have led to other than a further hearing of the matter if the Court were astute to protect the interests of the litigant person. It is, however, unnecessary for this Court to embark on the complications and difficulties that this aspect of the matter might theoretically have raised.

25. It is also unnecessary for either this Court or the Magistrates' Court to embark further on the facts of the matter. I am satisfied that the contract upon Mr Peluso purports to sue was not

in fact effected by the purported execution of the document by his attorney on 17 March 2010, and the appeal will be dismissed.

^[1] *Custom Credit Corporation Ltd v Gray* [1992] VicRp 36; [1992] 1 VR 540; [1991] ASC 56-096.

^[2] *Ballas v Theophilos (No 2)* [1957] HCA 90; (1957) 98 CLR 193; [1957] ALR 713, esp per Dixon CJ at CLR 197.

^[3] [2011] VSCA 116, [70].

APPEARANCES: For the appellant Peluso: Mr J Warren, counsel. Henderson & Ball, solicitors. For the respondent Safi: In person.
