

SUPREME COURT OF QUEENSLAND

CITATION: *Gilson v Flamingo Enterprises Pty Ltd* [2010] QSC 53

PARTIES: **WENDY GILSON**
(applicant)
v
FLAMINGO ENTERPRISES PTY LTD
ACN 010 310 488
(respondent)

FILE NO: 10676 of 2009

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING
COURT: Supreme Court of Queensland

DELIVERED ON: 26 February 2010

DELIVERED AT: Brisbane

HEARING DATE: 19 February 2010

JUDGE: Daubney J

- ORDER: **1. I declare that:**
- (a) Special condition 4 of the contract dated 7 May 2008 for the sale by the respondent to the applicant of proposed Lot 403 of “Beach on Sixth” for \$760,000 (“the unit”) (“the contract”) which states “4. The position of the unit must provide unobstructed ocean views” (“the special condition”) is a fundamental or essential condition of the contract;**
 - (b) The position of the unit does not “provide unobstructed ocean views” within the meaning of that expression as used in the special condition;**
 - (c) In consequence thereof, the respondent has breached the contract; and**
 - (d) The said breach has given rise to an entitlement on the part of the applicant to terminate the contract by notice to the respondent.**
- 2. I order the respondent pay the applicant’s costs (including any reserved costs) of and incidental to the originating application, to be assessed on the standard basis.**

CATCHWORDS: CONVEYANCING – THE CONTRACT AND CONDITIONS OF SALE – SALE OF PROPOSED LOT – where the applicant entered into a contract to purchase a residential apartment from the respondent which the respondent intended to develop – where the contract contained a number of special conditions – where the relevant special condition provided that “the positioning of the unit must provide unobstructed ocean views” – whether the positioning of the unit provides unobstructed ocean views within the meaning of that special condition

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – CONDITIONS – CONDITIONS AND WARRANTIES – where the applicant entered into a contract to purchase a residential apartment from the respondent which the respondent intended to develop – where the contract contained a special condition stating “the positioning of the unit must provide unobstructed ocean views” – whether the special condition was a fundamental or essential condition of the contract - whether the applicant has a right to terminate the contract for breach of an essential condition

DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1977-1978) 138 CLR 423, applied

Property Law Act 1974 (Qld) s70

COUNSEL: P Looney for the applicant
JW Lee for the respondent

SOLICITORS: Swanston and Associates Lawyers for the applicant
Griffiths Parry Lawyers for the respondent

- [1] By a contract dated 7 May 2008 (“the Contract”), the applicant agreed to purchase from the respondent a residential apartment (unit 403) in the “Beach on Sixth” building (“the Complex”) which the respondent intended to develop on Sixth Avenue, Maroochydore. The Contract, which was entitled “Contract of Sale – Off Plan Unit”, contained a number of special conditions, including:

“4. The positioning of the unit must provide unobstructed ocean views.”

- [2] The Complex has now been built. The applicant contends, however, that one does not have “unobstructed ocean views” from unit 403. The applicant has, in this proceeding, made an application pursuant to s 70 of the *Property Law Act* 1974 for declarations that:

- (a) special condition 4 is a fundamental or essential condition of the contract;

- (b) the position of the unit does not “provide unobstructed ocean views” within the meaning of that expression as used in special condition 4;
 - (c) as a consequence, the respondent has breached the contract, and
 - (d) the applicant therefore has a right to terminate the contract.
- [3] It was common ground between the parties that the present application did not in any way turn on representations which were, or might have been, made between the parties with respect to the views which might be obtained from unit 403. Nor does the outcome of the present application turn in any way on the construction or interpretation of the various clauses in the Contract which go to defining the content of pre-contractual representations or the reliance which might be placed on those representations.
- [4] Rather, with commendable efficiency, the parties have focused this case on the central issues, namely;
- (a) Is the respondent in breach of special condition 4; and
 - (b) If so, does the applicant now have a right to terminate?
- [5] Dealing first with the terms of special condition 4 itself, the task which falls to me is to interpret and apply the special condition according to its objective meaning. In that regard, there was some reference in the affidavit material filed on behalf of the applicant which sought to explain her understanding of the phrase “unobstructed ocean views” by reference to views which she has from the apartment in which she currently resides. In the course of argument, however, counsel for the parties agreed that this information from the applicant, whilst interesting, was not determinative of the meaning to be ascribed to special condition 4. Rather, as I have said, the task is for me to ascertain, on a reasonable basis, the objective meaning to the clause.
- [6] It seems to me that the words “unobstructed ocean views” are plain words susceptible of ready comprehension and application. The clear meaning of the clause is that, when constructed, one would have “unobstructed ocean views” from the unit. That does not necessarily mean that one would have panoramic views of the ocean from every point within the unit. Such an interpretation would, in my view, be quite unreasonable. But the term “unobstructed ocean views” means more than that one would have selected aspects of the ocean, depending on the direction in which one looks. The use of the word “views” tends to suggest a wider range of vision than a single aspect. Those views must be of the ocean, and not merely particular visual slices of the ocean, or the sky above the ocean. And those views of the ocean must be “unobstructed”. That word really speaks for itself.
- [7] The Complex in question is constructed on a block of land which is one street back from the road which runs as an esplanade along the beachside. The unit is on the fourth level of the eastern side of the Complex. The unit has a large balcony from which one has views from the north-east through to the south. There is another smaller balcony (off one of the bedrooms) on the southern side of the unit, from which one obtains a view from about the east through to the south.

- [8] The Complex is separated from the sea shore by buildings which are between it and the beachside esplanade, the esplanade street itself, and a park or beach protection area which leads down to the beach itself. Vegetation and trees have been planted, or are growing, along the beach protection zone.
- [9] It stands to reason that the place in the unit from which one would most likely have the most “unobstructed ocean views” would be the large eastern balcony. Photographs of the views obtained from that balcony are in evidence before me. More importantly, I had the considerable advantage of a site inspection with counsel and the solicitors for the parties, in the course of which I was able to ascertain for myself the nature and extent of the views which one can have from the balcony and from other parts of the unit.
- [10] If one stands on the large balcony of this unit and looks due east, one looks across the top of a lowset brick building directly to the east of the Complex, and then across the esplanade and the beach protection zone to a vista of the ocean beyond. In other words, when one looks directly east, one undoubtedly has an ocean view. When one turns one’s gaze, however, to the north-east, buildings between the Complex and the esplanade completely obstruct the view of the ocean. The view of the ocean to the north-east quarter from the balcony is completely obstructed by rooftops and buildings between the Complex and the beach. At best, one looks over the rooftops to see the sky above the ocean beyond, but one sees nothing of the ocean itself. When one looks to the south-east quarter, the view of the ocean is significantly obstructed by the roof of a neighbouring apartment block. Whilst again one can see the sky above the ocean, one can see very little of the ocean itself in that quarter because of the position of that neighbouring building. At best, the view in that quarter provides “ocean glimpses”, but not “unobstructed ocean views”. There are, however, views of the ocean and the seaway to Point Cartwright on both sides of this building in the south-east quarter.
- [11] Counsel for the applicant also sought to point to the interference with the ocean view caused by the trees and other vegetation planted in the beach protection zone. True it is that these trees and plants interfered with the view of the breakers on the beach itself, but my own observation was that these trees were not such a hindrance as to obstruct one’s view of the ocean by themselves.
- [12] As I have said, it stands to reason that the best opportunity to ascertain whether one has “unobstructed ocean views” is from the large eastern balcony of the unit. Counsel for the applicant conceded that it could properly be said that there are some ocean views available from this unit. I have attempted to describe those above. But, particularly by reason of the obstruction of the buildings in the north-east quarter and the south-east quarter between the subject unit and the ocean itself, I do not consider that it can objectively be said that one has “unobstructed ocean views” from this unit.
- [13] Accordingly, the respondent has failed to position the unit in such a way as to enable it to provide unobstructed ocean views. The respondent is in breach of special condition 4.
- [14] The next question, then, is whether breach of this special condition gives the applicant an entitlement to terminate the contract. That turns on whether the special condition is to be regarded as a fundamental or essential term. In *DTR Nominees*

Pty Ltd v Mona Homes Pty Ltd (1977-1978) 138 CLR 423, Stephen Mason and Jacobs JJ said at 430-431:

“Whether a term of a contract is essential or not is a question of construction which is to be answered with due regard to the general nature of the contract considered as a whole and to its particular terms. See *Tramways Advertising Pty. Ltd. v. Luna Park (N.S.W.) Ltd.* (2), where Jordan C.J. said:

‘The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor: *Flight v. Booth* (3); *Bettini v. Gye* (4); *Bentsen v. Taylor, Sons & Co.* [No. 2] (5); *Fullers’ Theatres Ltd. v. Musgrove* (6); *Bowes v. Chaleyer* (7); *Clifton v. Coffey* (8). If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight.’

This statement of the law, which was approved in *Associated Newspapers Ltd. v. Bancks* (9), emphasizes that **the quality of essentiality depends for its existence on a judgment which is made of the general nature of the contract and its particular provisions, a judgment which takes close account of the importance which the parties have attached to the provision as evidenced by the contract itself as applied to the surrounding circumstances.**” (emphasis added)

- [15] The circumstances in which special condition 4 came to be included in the Contract are explained in the affidavit material before me. On 12 April 2008, the applicant met with the respondent’s selling agent, and had a discussion with the selling agent about lots which were available in the development. She says that she told the selling agent that the only reason she was considering a purchase of a unit in this development was to get unobstructed ocean views, and asked whether this particular lot would give her unobstructed ocean views. She says that a few days later she called the selling agent and asked a number of questions about the unit and then said to him that she was ready to go to contract on Lot 403, but that her offer would contain a number of special conditions, including confirmation of there being unobstructed ocean views. The selling agent replied to the effect that the applicant should put any special conditions she wanted down on paper, and he would then submit those to the developer. He said that it was not up to him to accept or reject the special conditions, but would be referred to the developer. In an affidavit by the real estate salesman, he confirms that when he was discussing the terms of the contract with the applicant, she told him that she wanted special conditions. He told her to draft the special conditions she wanted and he would then submit them unaltered for the vendor’s approval. He confirms that the applicant provided him with the special conditions she sought (including the one in question in this case), which he submitted to the vendor, and to which the vendor agreed.

- [16] In short, it is clear that the inclusion of this special condition in the contract was a matter of importance to the applicant as purchaser. That importance was necessarily communicated to the respondent, as vendor, by the fact that it, and the other special

conditions sought by the applicant, were put directly in terms to the developer for the developer's approval and acceptance. The flow of negotiations leading up to the contract being executed containing the special condition made it clear that the contract was to be not merely for the purchase of a unit in the complex, but for the purchase of a unit positioned so as to have "unobstructed ocean views". I am therefore satisfied that this special condition was an essential term of the contract between the applicant and the respondent. Breach of that essential term gives rise to an entitlement on the part of the applicant to terminate the contract.

[17] Accordingly, there will be the following declarations:

- (a) Special condition 4 of the contract dated 7 May 2008 for the sale by the respondent to the applicant of proposed Lot 403 of "Beach on Sixth" for \$760,000 ("the unit") ("the contract") which states "4. The position of the unit must provide unobstructed ocean views" ("the special condition") is a fundamental or essential condition of the contract;
- (b) The position of the unit does not "provide unobstructed ocean views" within the meaning of that expression as used in the special condition;
- (c) In consequence thereof, the respondent has breached the contract; and
- (d) The said breach has given rise to an entitlement on the part of the applicant to terminate the contract by notice to the respondent.

[18] In argument before me, the parties agreed that costs ought follow the event. Accordingly, there will be an order that the respondent pay the applicant's costs (including any reserved costs) of and incidental to the originating application, to be assessed on the standard basis.