16/84

IN THE PRIVY COUNCIL APPEAL NO. 21 of 1983

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N:

BOHETO PTY LIMITED — Appellant (Defendant)

and

SUNBIRD PLAZA PTY LIMITED — Respondent (Plaintiff)

SUPPLEMENTARY CASE FOR THE APPELLANT

~~SUPPLEMENTARY CASE FOR THE RESPONDENT~~

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IN THE PRIVY COUNCIL NO. 21 OF 1983

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FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

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BOHETO PTY. LIMITED — Appellant (Defendant)

- and -

SUNBIRD PLAZA PTY. LTD. — Respondent (Plaintiff)

SUPPLEMENTARY CASE FOR THE APPELLANT

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1. This case is divided into Parts as follows:-

Part A - The significance of the judgment of the High Court of Australia in Deming No. 456 Pty. Ltd. & Ors. v. Brisbane Unit Development Corporation Pty. Ltd. (reported only in (1983) CCH Reports 56,654) (paras. 2 to 5)

Part B - The significance of the "Building Units & Group Titles Act Amendment Act 1983". (paras. 6 to 9)

PART A - THE SIGNIFICANCE OF THE JUDGMENT OF THE HIGH COURT OF AUSTRALIA IN DEMING NO.456 PTY. LTD. & ORS v. BRISBANE UNIT DEVELOPMENT CORPORATION PTY. LTD.

2. The decision of the High Court in the above case was given on 16th November, 1983. An appeal from the decision of the Full Court of the Supreme Court of Queensland was allowed by majority (Gibbs C.J., Mason, Deane and Dawson JJ., Wilson J. dissenting). The High Court considered the matters of statutory construction which arise in the instant appeal. The Full Court of the Supreme Court had applied what it saw as the ratio of the decision of the Full Court in the instant case.

3. Reference is made now to part D of the appellant's case setting out the instances of alleged non-compliance with s.49(2) to be relied on in this appeal. The conclusions in the High Court, in respect of similar instances of non-compliance, were as follows:

(a) Failure of the statement to set out or be accompanied by the proposed by-laws in respect of the proposed plan (s.49(2)(e))

All five members of the Court held to the effect that the proposed by-laws should be set out in full either in the statement itself or a document accompanying it. Reference elsewhere (e.g. to the Third Schedule to the Act) where some of the by-laws might be found would be insufficient.

(b) Failure to state the address of the original proprietor (s.49(2)(b))

A majority of the Justices, Mason, Deane and Dawson JJ., held that the s.49 statement must itself state the address of the original proprietor; that the s.49 statement could not properly be read as incorporating in itself the whole of the contract of which it formed but a part. Consequently, s.49 would not be complied with if the statement omitted the address, although the address might be found in another part of the contract.

(Gibbs C.J. and Wilson J. arrived at a contrary conclusion.)

(c) Failure to state the date on which the statement was given (s.49(2)(f))

Gibbs C.J. held that when the statement forms part of a contract the date on which the statement is given must be the date of the contract, and if the contract itself is dated, there is a sufficient compliance with s.49(2)(f). Mason, Deane and Dawson JJ. held that the provisions of s.49(2)(f) should be construed as inapplicable where the statement constituted part of the relevant contract. Wilson J. held, in effect, that the statement, where forming part of the contract, should bear the date on which the contract came into force.

4. Reference is now made to paragraphs 47 to 51 of the appellant's case, as to the appellant's voidance of the contract consequent upon the non-compliance. The members of the High Court considered the question of when a purchaser, in terms of s.49(5), "becomes aware of the failure" to give a statement in compliance in every respect with s.49(1), (2) and (3). A majority of the Justices (Mason, Deane and Dawson JJ.) held that a purchaser could not be said to become aware of such failure until actually aware both "that a statement containing the specified material has not been given (and)...that the fact that such a statement was not given constitutes a "failure" to do

something which the Act says should be done". The reasoning of the majority on this aspect is respectfully adopted. (Gibbs C.J., with expressed doubt, considered that awareness of the failure arose upon awareness merely of the circumstances amounting to the failure, without appreciation that they involved non-compliance with s.49.)

5. It is respectfully submitted:

(a) that the application to this case of the above decision of the High Court would lead to the success of this appeal;

(b) that there is no compelling reason why the decision of the High Court should not be folloowed;

(c) that the decision of the High Court ought to be followed in the interests of legal certainty (cf. Max Cooper and Sons Pty. Ltd. v. Sydney City Council (1980) 54 A.L.J.R. 234, 237-8 (Privy Council)).

PART B - THE SIGNIFICANCE OF "THE BUILDING UNITS & GROUP TITLES ACT AMENDMENT ACT 1983" (hereafter termed "the amending Act")

6. The amending Act was assented to on 22nd December, 1983. A copy of the amending Act forms an appendix to this supplementary case. The only provision of the amending Act of arguable relevance to this appeal is s.3, which inserts a new s.49A into the principal Act.

7. As a matter of construction, s.49A has no relevant application in these proceedings, for the following reasons:

(a) It applies only to avoidances pursuant to s.49(5), effected subsequently to the enactment of the amending Act. Paragraph (a) of s.49A refers to avoidances, but does not include avoidances pre-dating the amending Act. Paragraph (b) refers to proceedings "whenever...commenced" but not to avoidances whenever effected. The apparent purpose of s.49A is:

(i) to redefine the purchaser's rights in circumstances where the purchaser avoids under s.49(5) at some time after 22nd December, 1983 (the commencement date of the amending Act); and

(ii) to establish that the effectiveness of an avoidance effected after 22nd December, 1983 is to be determined in the light of s.49A, even though

proceedings in respect of the relevant contract (e.g. a specific performance suit) may earlier have been commenced (and in which no s.49(5) avoidance was then in issue).

We revert to matter (ii) in paragraph 8(c) below.

(b) Further, s.49A does not deem a purchaser to have been aware of the failure to give a statement in compliance with s.49 upon his receipt of the statement.

It deems him:

(i) to have been aware of the provisions of s.49;

(ii) to have been aware of the obligations of an original proprietor under that section;

(iii) to have read any s.49 statement or notice given to him at the time when he received it.

The conjunction of those circumstances would not necessarily mean that a purchaser would be aware of the "failure" in terms of s.49(5). He may, simply enough, not have put the facts and the law "together" so as to arrive at an actual appreciation of the failure. It is that actual appreciation of the failure which the majority of the Justices in the above decision of the High Court considered essential. The legislature has apparently been careful not to deem purchasers to have been aware at any particular stage of the "failure" itself.

(c) Paragraph (b) applies prospectively to judgments and decisions, the assumption being that no judgment or decision in the proceedings had been given prior to 22nd December, 1983. The reference to judgments and decisions should not be construed to include the outcome of an appeal, especially an appeal such as this from a final judgment. The correctness of the Full Court's approach should be tested without reference to s.49A: if the Full Court's decision was wrong, then the appeal should be upheld.

8. It is submitted that the above approach to the construction of the amending Act is consistent with

the principles:

(a) that a statute should not be interpreted retrospectively so as to impair an existing right unless that result is unavoidable on the language used (Yew Bon Tew v. Kenderaan Bas Mara (1983) A.C. 553, 558). (And see s.20 "Acts Interpretation Act, 1954-1977", and Maxwell v. Murphy (1957) 96 C.L.R. 261, 267, 270; Fisher v. Hebburn Ltd. (1960) 105 C.L.R. 188, 194; Zainal bin Hashim v. Malaysia Government (1980) 2 W.L.R. 136, 140-1; Geraldton Building Co. Pty. Ltd. v. May (1977) 13 A.L.R. 17, 35);

(b) that if Parliament intends to derogate from the commonlaw or vested rights of the citizen it should make its intention in that respect plain;

(See Wade v. New South Wales Rutile Mining Company Pty. Ltd. & Ors. (1970) 121 C.L.R. 177, 181; Gardner v. Lucas (1878) 3 App.Cas. 582, 603; and Moon v. Durden (1848) 2 Ex. 22, 42; 154 E.R. 389, 397.)

(c) that for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature (Zainal bin Hashim v. Malaysia Government, supra, p.141). It was presumably in recognition of this principle that paragraph (b) was included in s.49A, to avoid a contention that s.49A would be inapplicable to an avoidance under s.49(5) effected after 22nd December, 1983 because proceedings in respect of the subject contract had been commenced before that date.

Dated this 28th day of February, 1984

Paul A Jeary Q.C.

Counsel for the appellant