IN THE PRIVY COUNCIL

16/84

ON APPEAL FROM THE FULL COURT
OF THE SUPREME COURT OF QUEENSLAND

No. 21 of 1983

BETWEEN:

BOHETO PTY. LTD.
(Defendant)

Appellant

AND:

SUNBIRD PLAZA PTY. LTD.
(Plaintiff)

Respondent

WRITTEN CASE FOR RESPONDENT

The respondent has not had access to the appellant's written case but the questions arising on the appeal appear to be:-

(1) (If raised by the appellant) whether the appeal ought to be allowed on the basis of the matter being too difficult or complicated to be disposed of on judgment summons;

(2) whether there was non-compliance by the respondent with section 49 of the (Queensland) Building Units and Group Titles Act 1980;

(3) if so, whether the appellant gave notice "voiding" the parties' contract within the time allowed by section 49(5).

The respondent contends that each question ought to be answered "no" and that the judgments of Williams AJ at first instance, and of the Full Court of the Supreme Court of Queensland are correct, except in one respect: the respondent contends that Matthews and McPherson JJ were wrong in holding that the respondent was in breach of section 49(2)(e), and the Chief Justice (dissenting on the appeal) and Williams AJ were correct on this issue.

QUESTION 1

The view of McPherson J in the Full Court (at pages 78-79 of the Appeal Book) is relied upon. This attitude, as opposed to the "judicial inertia" McPherson J criticised, is in line with current practice.

The matter was fully argued, and there were no disputed questions of fact which could affect the result.

Below it has been asserted there were serious disputed questions of fact not capable of summary determination, namely the dates of signature of the Eleventh Schedule and of the Contract. There are no issues raised at all. On the material (p.43 para.4; p.36 para. 2) both were signed after 3rd April 1981 and before 1st June 1981. There is nothing to cast any doubt on the date both bear, 27th May 1981, which is corroborated by the Power of Attorney at p.35. See B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. (1983) Qd.R.16, 21-22, citing Halsbury's Laws of England (4th) 12:1486. The matter was properly determined summarily:-

> Theseus Exploration N.L. v Foyster
> 126 C.L.R. 507 at 514 (Barwick CJ), 523 (Stephen J)
>
> Rosser v. Austral Wine & Spirit Co. Pty. Ltd. & Ors.
> (1980) V.R. 313, 320
>
> Bassingthwaite v. Butt
> (1982) Qd.R.670, 674-5
>
> Boneo v. Williams
> CCH Queensland Building Units and Group Titles Service Reports 30-040 at 50,277

(These reports are hereafter cited as "CCH Reports")

A similar approach has been taken in England:

> Cow v. Casey
> (1949) 1 K.B. 474, 481

The most recent High Court treatment of summary judgment evidence is in Mercantile Credits Ltd. v. Fancourt (unreported) 11th August 1983. As the primary Judge held, (56) no amount of evidence at a trial would "alter the basic facts material for a determination of the issues raised". The respondent adopts McPherson J's views expressed in the Full Court in the paragraph at pp.78-9.

The remaining question under this head is whether the appellant raised any triable issue success as to which would lead to success in the action. No such issue was shown before the primary Judge, or has yet been shown. The

Full Court correctly held that the possibility that by the time of a trial such an issue might be found was no reason for granting the defendants leave to defend. See McPherson J's reasons at page 92 of the Appeal Book.

QUESTION 2

It is convenient to deal in turn with the respects in which the appellants have contended below that the respondent failed to comply with section 49.

The first non-compliance set up in the Full Court was failure of the Eleventh Schedule to clearly identify the lot in alleged breach of section 49(2)(a). The primary Judge was correct in holding (at p.59) that by marking the floor plan and initialling it (p.18) the parties clearly identified it in the Eleventh Schedule (p.20) as an "A" unit on the 14th floor, as it is on the front page of the contract (p.9). McPherson J. correctly dealt with this point in the Full Court (pp 82-83).

The second respect in which it is alleged that the respondent failed to comply with section 49 is in respect of the original proprietor's address, required to be stated under section 49(2)(b). As to that, the respondent points out that:-

(i) the original proprietor is named, as the plaintiff company;
(ii) a postal address of the vendor's solicitor appears at the foot of page 20;
(iii) the contract on its first page (p.9) identifies the same company as vendor; and
(iv) by clause 19 (p.11) notices may be sent to either party by being sent to its solicitors.

It is an irresistible inference from the contract read as a whole that original proprietor and vendor are one and the same and that the address care of the solicitors is nominated: compare Bird v. Davey (1891) 1 Q.B. 29.

A postal address, given in a contract, as here, suffices: see Mercantile Credits Ltd. v. Fancourt (unreported) High Court Appeal from (1982) Qd.R. 531. The Shorter Oxford dictionary defines address as the direction or superscription of a letter. It is sufficient to state an address at which notices will be received: Dolcini v. Dolcini (1895) 1 Q.B. 898. The primary Judge correctly held there was no failure to state the address (p.58) and so did the Full Court - per McPherson J at 84-5 citing R. v. Bishop (1959) 2 All E.R. 787, 791 and Blackwell v. England (1857) 8 E & B 541; 120 E.R. 202. McPherson J. analysed the problem at greater length in Sunbird Plaza Pty. Ltd. v. Aurisch Investments Pty. Ltd. (1983) Qd.R. 145, 147-9 preferring the result reached by the primary Judge here to that of Kelly J in Boneo Properties Pty. Ltd. v. Fardmir CCH reports 30-040. The question should be approached in light of the evident purpose of requiring the address to be stated, viz. to enable notices to be given for purposes of s.49: (Sunbird v. Aurisch (1983) Qd.R. 145, 149 C-F). Further decisions of McPherson J on the "address" point are:

B.U.D.C. Pty. Ltd. v. Sokola Pty. Ltd.
CCH reports 30-051; 7 A.C.L.R. 276, 277

B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd.
(1983) Qd.R. 16, 23F-24F which has been affirmed on appeal by the Full Court: Q.L.R. 21.5.83 p. 371

Thirdly, it is said the section 49 statement did not set out the proposed bylaws, and so did not comply with s.49(2)(e).

The contract's third schedule (p.12) reproduces in full only the proposed amendments to the statutory bylaws in the third schedule to the Act, which apply by force of section 30.

The appellant's argument assumes that "set out" must mean "set out in full". It would be proper usage to say that a statute "sets out" the repealed enactments in a schedule, even if the schedule merely lists them. This is in accordance with Queensland legislative drafting

practice. See Children's Services Act 1965, Adoption of Children Act 1964, and Acquisition of Land Act 1967. The Act itself (s.30) makes the scheduled bylaws apply. The respondent sets out in the contract and in particular in the eleventh schedule those bylaws which apply by unequivocally identifying them. The principle that a party cannot ordinarily acquire rights because of ignorance of the general law assists.

The primary Judge correctly decided (p.59) that the whole of the bylaws were "set out", in the sense of being defined with sufficient certainty. The same view has been taken or applied by other judges:-

> Kelly J. in Boneo Properties Pty. Ltd. v. Fardmir CCH reports 30-040
>
> McPherson J. in B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. (1983) Qd. R.16, 25
>
> Shepherdson J. in Silverton Limited v. F.S. Carroll Pty. Ltd. (1983) Qd.R. 72 followed in Silverton Limited v. Juricak CCH reports 30-047

The Chief Justice of Queensland took this view in the Full Court (pp. 67-71), and it is submitted that his views are correct. Incorporation by reference to a statute is sufficient setting out. In this regard, the majority view in the Full Court (see per McPherson J. p.88) ought to be overruled. This majority ruling has been applied by the Full Court in subsequent matters without further discussion in the Judges' reasons, for example in B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. (No. 2) Q.L.R. 21.5.83, on the basis that the Full Court is bound by the ratio of its previous decisions.

The fourth alleged non-compliance is in respect of the section 49 statement's being allegedly undated, contrary to section 49(2)(f). The statement is dated (p.20) sharing a common date with the contract (p.9) of 27th May 1981. The date must be taken as inserted after execution of the contract by the purchaser. See paragraph 4 of Mrs. Cussan's affidavit (p.43). The statement forms part of the contract

(section 49(3)(b)) and can appropriately bear the same date. Section 49(2)(f) is to be read with section 49(3)(b): B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. (1983) Qd.R.16 21-2.

Before the primary Judge, the appellants contended that the section 49 statement was not signed in compliance with section 49(2)(g). The statement was first given to the appellants unsigned (p.43 para. 4) but was signed with the contract. As to its forming part of the contract, see the paragraph below.

The appellants have asserted below that all the information required of a section 49 statement must be set out in extenso therein. Section 49(3)(b) is to the contrary; McPherson J dealt with its effect in B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. (1983) Qd.R. 16, 21-2, 23-24 (affirmed by the Full Court Q.L.R. 21.5.83) and in the judgment under appeal in the paragraph at 83-4. The primary Judge adopted the same approach (p.57-8), as did the Full Court in B.U.D.C. Pty. Ltd. v. Robertson Q.L.R. 9.7.83 p.525; CCH reports 30-060.

The appellants have contended below that the relevant date and signature must exist prior to the purchaser's signature of the contract. See the primary Judge's (pp 57-8) and McPherson J's reasons at pp 85-7. Such a contention is inconsistent with:-

(i) the language of s.49(3)(b);

(ii) the well known practice whereby a purchaser signs a contract first; and

(iii) other authority namely McPherson J's views (referring to that practice) in B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. (1983) Qd. R. 16, 22, affirmed by the Full Court Q.L.R. 21.5.83 and in the present case.

The statute is penal (see section 133) and without clear words it should not be held that interposition of other material, such as the contract, in the s.49(2) information is unlawful. The statute does not say there can be no such material - compare s.66 of the Auctioneers and Agents Act, referred to in McPherson J's reasons at p.84.

As a penal provision s.49 ought not where its interpretation is doubtful receive one which places original proprietors in breach of the law. Nor should it receive any interpretation (where another is arguable) which interferes with the inviolability of contracts. The primary Judge was correct in taking this view (p.62) which the Full Court has explicitly taken in B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. Q.L.R. 21.5.83: CCH reports 30-056 at 50-385.

QUESTION 3

The respondent succeeded in the Full Court notwithstanding an adverse decision by the majority on the "bylaws" point, because the appellant did not put forward evidence sufficient to raise a triable issue as to awareness.

(a) The most important point is the meaning of "aware of the failure" in s. 49(5). If that is decided in the respondent's favour, no amount of success upon other questions will assist the appellants.

(b) The question is whether the time for voidance is extended until the purchaser knows, not only all the facts, but every legal point applicable to his case.

(c) The facts as to awareness are at pp. 36, 37, 39, 42, 44 and 45. Note that the appellant put forward no case of unawareness of facts, as opposed to law, nor have the arguments thus far done so. Note that Mrs. Cussan's affidavit at p.44 (paras. 7 and 8) does not set up any factual ignorance.

It is apparent from ex. "A" 9p.46) and para. 3 (pp.42-43) of the affidavit that Mrs. Cussan had the form of contract and the form of section 49 statement soon after 3rd April 1981, and from Mr. M.F. Elliott's affidavit (p.36 para. 2) that he (as the appellant's solicitor) had the executed contract on 1st June 1981. The appellant's state of mind appears from ex. "G" to Beaconsfield's affidavit (p.27). The appellant repented of its bargain, and was no

longer ready to pay the agreed price.

There is a "presumption of law" that a person executing a document is aware of its contents, referred to by the primary Judge (at p.61). Conceding the presumption to be rebuttable, it may only be rebutted by evidence: re Cooper (Cooper v. Vesey) (1882) 20 Ch.D.611, 629, and none is presented here. Mrs. Cussan (p.43 para. 4) paid enough attention to the eleventh schedule to note that it was unsigned. It is significant that she does not depose to a lack of knowledge of any facts (nor does anyone else) but merely to a lack of appreciation of the legal consequences of matters which were patent. In the Full Court McPherson J. at 90-91 gave insufficient weight to the dictum in re Cooper. Later the Full Court in B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. Q.L.R. 21.5.83; CCH reports 30-056, at 50, 385-6 appeared inclined to favour application of the dictum, but in the end in accordance with its practice of deferring to earlier Full Court judgments, did not apply it. Connolly J. there referred to other circumstances creating constructive knowledge or awareness.

Awareness of contents of a document by a party is presumed from his execution of it, and this proposition does not depend solely on the dictum in re Cooper (1882) 20 Ch.D.611, 629. See for example Paul & Vincent Ltd. v. O'Reilly (1914) I.L.T.R. 89. The same principle is illustrated by cases on wills, although there the question of approval arises, as well as awareness: Guardhouse & Ors. v. Blackburn & Anor. (1866) L.R. 1 P. & D. 109, 116; Atter & Ors. v. Atkinson & Anor. (1866) L.R. 1 P. & D. 665; Harter & Slater v. Harter & Ors. (1873) L.R. 3 P. & D. 11, 22; Beamish v Beamish (1894) 1 I.R. 7,21.

Even possession of documents or access to them may be evidence of knowledge of their contents.

Halsbury's Laws of England (4th Ed.) 17: 44
Wigmore on Evidence (3rd Ed.) 245, 260
Phipson on Evidence (12th Ed.) 412
Abbott's Proof of Facts (4th Ed.) 741

The primary Judge correctly dealt with this matter at p.60-61.

The 30 day limit was introduced to avoid long uncertainty as to the enforceability of the contract. If the appellant is right, it will not achieve that purpose, as (this case amply illustrates) there is much room for legal debate about the requirements of the statement.

This case shows the vice of allowing purchasers a new 30 days to "void" their contract solemnly entered into after they acknowledge "awareness" of a newly perceived consequence of patent facts under section 49. Here, a second notice has already been given (p.48 para. 4). Th e notices are at p.30 and p.41. Is there to be a third notice on a new ground, or a fourth?

The respondent contends that, whenever the appellant is taken to have had the necessary "awareness", it was more than 30 days prior to 24th June 1982 when notice under s.49(5) was given.

There is a tendency to deny a right to escape from liability on the ground of lack of legal knowledge. Although it is possible to construe s.49(5) as giving an indefinite right of rescission until the purchaser chooses to inform itself about the law, the construction adopted by the learned primary Judge (at p. 60-61) and by the Full Court (per McPherson J (pp 89-90) and also Matthews J at p. 72) is more orthodox: i.e. assuming that the "awareness" relates to factual matters:

> Bilbie v. Lumley & Ors.(1802) 2 East 469; 102 E.R. 448 at 449.2
>
> East Anglian Rlys. Company v. Eastern Counties Railway Company (1851) 11 C.B. 755, 811; 138 E.R. 680 at 694.9

Even if there be no presumption that everyone knows the law, a party cannot be heard in a Court of law to set up that he did not know it: Maltby v. Murrells (1860) 5 H. & N. 813; 157 E.R. 1405; 2 L.T. 362.

There is a tendency to construe statutes as speaking of facts, not law, when they make awareness of an illegality relevant:

Iannella v. French 119 C.L.R. 84 at 101.5, 112, 113
Manning v. Cory (1974) W.A.R. 60 at 63/15-40

The same approach is taken in an analogous context of extension of limitation periods depending on knowledge: Harris v. Gas & Fuel Corporation of Victoria (1975) V.R. 619, 624.

The knowledge of the solicitor should be attributed to the client:

Vane v. Vane (1872-1973) L.R. 8 Ch. App. 383 at 399, 400

Sargent v. A.S.L. Developments 131 C.L.R. 634 at 649.2, 658-9

Whenever the appellant may have become aware of any non-compliance with section 49 that may be found, it faces the further hurdle of showing that the notices it has given under section 49(5) were in compliance with that provision. Such a notice may be given only after becoming aware; it cannot be given before the purchaser is aware of non-compliance (or more accurately the facts constituting non-compliance):

Scarfe & Ors. v. The Federal Commissioner of Taxation (1920) 28 C.L.R. 271, 276

R. v. Anglesey Justices (1892) 2 Q.B. 29

Such awareness is a condition of being able to give a section 49(5) "voiding" notice. Here the appellant shows nothing as to when any person first became aware of the facts constituting any of the several aspects of non-compliance now raised. All of its evidence is in terms of awareness of "defects" (which imports a legal conclusion) and, furthermore, none is specific as to which aspect of non-compliance is referred to, except Mrs. Cussan's statement at pages 47-8, paragraph 3. The second notice, at p. 41, is ineffective because the alleged

non-complainces were not non-compliances at all and because the evidence did not show ignorance of the facts. As to the need for the purchaser to condescend to particulars of the non-compliance relied on: see the
360 Full Court's reasons in B.U.D.C. Pty. Ltd. v. Deming No. 456 Pty. Ltd. Q.L.R. 21.5.83; CCH reports 30-056, 50-383.

On a judgment summons, the defendant is entitled to leave to defend only on swearing to "material facts" or "actual facts" which make it reasonable for him to be allowed to raise that defence: Wallingford v. Mutual Society (1880) 5 App. Cas. 685, 697, 704, 709; Cloverdell Lumber Co. Pty. Ltd. v. Abbott (1924) 34 C.L.R. 122, 128; B.U.D.C. Pty. Ltd. v Robertson Q.L.R. 9.7.83; CCH Reports 30-060, 50-412,3. the appellant, by this test, must
370 fail, as Matthews J (p.72) and McPherson J (91-92) the Chief Justice agreeing (67) held in the Full Court.

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