

Frances Park (Darwin) Pty Ltd v Chin & Anor [2009] NTSC 45

PARTIES: FRANCES PARK (DARWIN) PTY LTD
(ACN 090 382 219)

v

ANDREW CHIN

And:

CHUN LOI CHIN

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: AP 3 of 2009 (20911320)

DELIVERED: 16 September 2009

HEARING DATE: 31 July 2009

JUDGMENT OF: RILEY and SOUTHWOOD JJ and
OLSSON AJ

APPEAL FROM: MARTIN (BR) CJ

CATCHWORDS:

APPEAL – CONTRACTS – VENDOR AND PURCHASER – construction of
clause – failure to discharge obligation – valid rescission of contract –
appeal dismissed

Toll (FGCT) Pty Ltd v Alpharpharm Pty Ltd (2004) 219 CLR 165, followed
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, referred to

REPRESENTATION:

Counsel:

Appellant: I C Robertson SC
Respondent: A Wyvill

Solicitors:

Appellant: CridlandsMB
Respondent: T S Lee & Associates

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Frances Park (Darwin) Pty Ltd v Chin & Anor [2009] NTSC 45
No AP 3 of 2009 (20911320)

BETWEEN:

FRANCES PARK (DARWIN) PTY LTD
(ACN 090 382 219)
Appellant

AND:

ANDREW CHIN
First Respondent

AND:

CHUN LOI CHIN
Second Respondent

CORAM: RILEY and SOUTHWOOD JJ and OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 16 September 2009)

RILEY J:

- [1] On 20 May 2009, in the Supreme Court, the respondents were granted declarations that they had validly terminated three contracts for the sale of land within a subdivision known as the Frances Park Estate. The Court also ordered repayment to the respondents of the deposits paid under the contracts amounting to a total of \$64,000 together with any interest accrued thereon. The appellant has appealed against the judgment on the ground that

the learned trial Judge erred in his construction of the relevant clause of the contract and also challenging his exclusion of certain evidence.

- [2] As the learned trial Judge noted the essential facts of the matter were not in dispute. The land in question had been used as an oil storage facility operated by BP Australia Pty Ltd. The appellant purchased and subdivided the land ("the Parent Parcel"). The respondents then signed three contracts to purchase from the appellant three lots constituting part of the Parent Parcel ("the Land"). Settlement on the contracts was due on 5 January 2009.
- [3] On 30 January 2009 the respondents purported to exercise a power of rescission with respect to each of the contracts.
- [4] At the time the contracts were executed the parties were aware that past use of the Parent Parcel may have caused contamination. Possible contamination of the Land was not merely an economic concern but also a potential serious health concern for any prospective purchaser. In each of the contracts the respondents acknowledged that parts of the Parent Parcel "may contain residual levels of petroleum hydrocarbons and may be subject to remediation works in respect of those levels". The appellant provided the respondents with preliminary information regarding the environmental status and remediation of the Parent Parcel by providing a copy of a summary of the Environmental Auditor's Report in respect of the Parent Parcel along with access to the full Environmental Auditor's Report. The contract recorded that the appellant was not responsible for the contents of the report

and "the purchaser should obtain its own advice in relation to, and satisfy itself as to, the environmental status of the Parent Parcel" and of the Land. In addition, each contract included a clause (cl 11) in which the respondents acknowledged that the decision on their part to purchase the Land was the result of their own investigations and enquiries and that they did not rely upon any warranty, representation or assurance given by the appellant.

[5] In the proceedings before the learned trial Judge the issue was whether the appellant had failed to comply with the requirements of cl 31.3 of each contract thereby giving rise to the right to rescind. Clause 31 of each contract was in the following terms:

31. REMEDIAL WORKS

The Purchaser acknowledges:

- (a) that certain parts of the Parent Parcel (which may include the Land) may contain residual levels of petroleum hydrocarbons, and may be subject to remediation works in respect of those levels;
- (b) that Frances Park has, with the intent of providing preliminary information regarding the environmental status and remediation of the Parent Parcel, provided to the Purchaser a copy of a summary of the Environmental Auditor's Report in respect of the Parent Parcel, which is attached to this Agreement as Annexure C and has notified the Purchaser that a copy of the full Environmental Auditor's Report may be obtained from the Northern Territory Department of Infrastructure Planning and Environment; and
- (c) Frances Park is not responsible for the contents of the Environmental Auditor's Report and the Purchaser should obtain its own advice in relation to, and satisfy

itself as to, the environmental status of the Parent Parcel and the Land.

31.2 The Purchaser:

- (a) acknowledges that there are ground wells located on certain parts of the Parent Parcel which are installed for the purpose of monitoring levels of petroleum hydrocarbons in the groundwater in the vicinity of the Land;
- (b) acknowledges that BP Australia Pty Ltd, as the previous proprietor of the Parent Parcel, requires access to the ground wells for the purpose of carrying out a monitoring program;
- (c) must not interfere or allow others to interfere with the ground wells or allow anything to be built over the top of those ground wells or obstruct access to those ground wells in any way.

31.3 This Agreement is subject to and conditional on Frances Park providing to the Purchaser written confirmation from an accredited environmental auditor that the Land is suitable for residential use and occupation, subject to there being no use of the phreatic groundwater from the Parent Parcel other than for the purpose of environmental monitoring.

31.4 If clause 31.3 is not satisfied at least 2 days before the date for completion, the Purchaser may at any time prior to completion whilst clause 31.3 remains unsatisfied, rescind this Agreement by notice in writing to Frances Park.

[6] It was the submission of the appellant before the learned trial Judge that cl 31.3 had been complied with by virtue of a document dated 28 June 2007 headed "Statement of Environmental Audit" and provided to the solicitors for the respondents by letter dated 11 December 2008. The statement, which

was in similar terms to the Environmental Auditor's Report attached to the contract as annexure C, was in the following terms:

STATEMENT OF ENVIRONMENTAL AUDIT

I, Adrian Hall of URS Australia Pty Ltd, a person appointed by the Environment Protection Authority of Victoria ('the Authority') under the *Environment Protection Act 1970* ('the Act') as an environmental auditor for the purposes of the Act, as recognised in the Northern Territory, having

1. been requested by BP Australia Pty Ltd to issue a statement of environmental audit in relation to the site located at Lot 7491 (17) Dinah Beach Road, Town of Darwin (formally Remediation Zone 2 of the BP Darwin Terminal) Northern Territory ('the site') owned/occupied by Frances Park (Darwin) Pty Ltd
2. had regard to, amongst other things,
 - (i) relevant guidelines issued by the Victorian EPA and endorsed by the Northern Territory Department of Natural Resources, Environment and the Arts (NRETA), including guidelines issued by the National Environment Protection Council
 - (ii) the beneficial uses that may be made of the site, and
 - (iii) relevant environment protection policies, related waste management policies, and planning instruments

in making a total assessment of the nature and extent of any harm or detriment which may be caused to, or the risk of any possible harm or detriment which may be caused to, any beneficial use made of the site by any industrial processes or activity, waste or substance (including any chemical substance), and

completed an environmental audit in general accordance with Section 53X of the above Act insofar as it applies to the Northern Territory, a copy of which report and statement of environmental audit has been sent to the Department of Natural Resources, Environment and the Arts;

HEREBY STATE that I am of the opinion that

The site is suitable for the beneficial uses associated with:

- single dwelling residential living
- all uses permitted under the Northern Territory Planning Scheme, as amended 13 June 2007, for SD20 Zone,

subject to the following conditions attached thereto:

- (i) There should be no use of groundwater from the site, other than for the purposes of environmental monitoring.
- (ii) Within six (6) months of the date of this Environmental Audit Report, an appropriate Groundwater Monitoring and Management Plan (GMMP) for the former Terminal site will be prepared by BP Australia Pty Ltd, and submitted for approval by a Victorian EPA accredited Environmental Auditor and by NRETA, prior to implementation.

I have not issued the equivalent of an unconditional Certificate of Environmental Audit for the site in its current condition, the reasons for which are presented in the environmental audit report and are summarised as follows:

- (i) Groundwater is polluted in wells on the site, with elevated levels of some heavy metals.

This statement of environmental audit forms part of the following environmental audit report.

A preliminary issue

- [7] In its written submissions the appellant raised, as a preliminary issue, whether the matter proceeded before the learned trial Judge as an application for summary judgement or as a final hearing. Reference to the transcript of

the proceedings before his Honour makes it clear that the parties proceeded on the basis of a "final hearing in this matter", being of the Originating Motion. The appellant did not contend otherwise before this Court.

Ground 1: Construction of clause 31

- [8] In construing cl 31 the learned trial Judge applied the principle stated in the judgment of the High Court in *Toll (FGCT) Pty Ltd v Alpharpharm Pty Ltd*¹:

This Court, in *Pacific Carriers Ltd v BNP Paribas* [(2004) 218 CLR 451], has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction [*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461 - 462 [22]].

- [9] His Honour identified the relevant "surrounding circumstances" as including the fact that the Parent Parcel had previously been used for purposes which had or were likely to have resulted in contamination of the Land rendering the Land unfit for residential purposes. He referred to cl 11 and then concluded that:

"(T)he primary purpose of clause 31.3 is readily ascertained as providing the purchasers with an assurance that, subject to phreatic

¹ (2004) 219 CLR 165

groundwater not being used for any purpose other than environmental monitoring, the land being purchased by the purchasers was fit for the intended use, namely, "residential use and occupation".

[10] The learned trial Judge found that the Statement of Environmental Audit did not discharge the obligation of the appellant under cl 31.3 of the contracts and concluded that the respondents were entitled to rescind the contracts.

[11] The appellant accepted that the learned trial Judge applied the correct test as to the construction of the contracts in relying upon the propositions set out in the passage quoted from *Alpharpharm*. However, the appellant submitted that in the context of this case the "surrounding circumstances" supported the construction of cl 31.3 as requiring two elements namely:

- (a) written confirmation from an accredited environmental auditor;
- (b) that the land "is suitable for residential use and occupation".

[12] The appellant submitted that, for the purpose of the prescribed use and occupation, the phreatic groundwater from the Parent Parcel can be used for environmental monitoring. The assessment of the Land may be by reference to attributes beyond the Land. The appellant contended that the so-called "conditions" referred to by the Auditor were not conditions relating to the suitability of the land for residential purposes but, rather, related solely to the use of groundwater for monitoring and management purposes. The appellant submitted that, at the time of delivery of the Statement, the Land

was suitable for residential purposes and the Statement constituted "written confirmation from an accredited environmental auditor" that this was so.

[13] It was submitted that the effect of his Honour's construction was to treat the use of the phreatic groundwater from the Parent Parcel as a condition and the proposed environmental monitoring as a second condition. It was submitted that the learned trial Judge misconstrued cl 31.3 and misread the Statement of Environmental Audit confirmation by impliedly finding that the "second proviso" or condition meant that the land was not "suitable for residential use and occupation".

[14] To interpret the contract it is necessary to apply the "principle of objectivity" referred to in *Alpharpharm*. The meaning of clause 31.3 is to be determined by what a reasonable person would have understood the clause to mean by reference to the text of the clause, the surrounding circumstances known to the parties and the purpose and object of the transaction.

[15] It is apparent that the parties were well aware that the Land may have been contaminated as a result of past use. The terms of the contract were designed to exclude any recourse by the purchaser against the vendor should the purchased land prove not to be fit for residential use. In those circumstances cl 31.3 accorded protection for the purchaser by providing that the agreement to purchase was subject to, and conditional upon, the vendor "providing to the purchaser written confirmation from an accredited

environmental auditor that the Land is suitable for residential use and occupation". The purchaser could thereby obtain confirmation from a relevant expert that the Land was fit for the purpose for which it was purchased. In the absence of written confirmation in accordance with cl 31.3 the purchaser could rescind. In the event that the written confirmation was provided and the Land was not fit for the purpose, the purchaser would then have recourse against the expert but not the vendor. The contracts expressly allowed the written confirmation to be qualified by only one condition or qualification being that the phreatic groundwater from the Parent Parcel was not to be used other than for the purpose of environmental monitoring.

[16] In the light of that background the learned trial Judge determined, in my view correctly, that:

(T)he primary purpose of clause 31.3 is readily ascertained as providing the purchasers with an assurance that, subject to phreatic groundwater not being used for any purpose other than environmental monitoring, the land being purchased by the purchasers was fit for the intended use namely, "residential use and occupation".

[17] Reference to the Statement of Environmental Audit provided to the respondents reveals that, whilst the author expressed the opinion that the site was suitable for single dwelling residential living and all uses permitted under the Northern Territory Planning Scheme, he deliberately did not issue an unconditional certificate for the Land "in its current condition" because

"groundwater is polluted in wells on the site, with elevated levels of some heavy metals".

[18] As the respondents submitted, the provision of the statement referred to in cl 31.3 served the purpose of providing legal protection for the respondents in the event that the Land was revealed to be not fit for residential use. The requirement was for a clear and unconditional statement that the Land was suitable for residential use and occupation subject only to there being no use of the phreatic groundwater from the Parent Parcel other than for the purpose of environmental monitoring.

[19] In the Statement of Environmental Audit an additional qualification was added by the author. That qualification required a Groundwater Monitoring and Management Plan to be prepared by BP Australia Pty Ltd, which company was not a party to the contract, and submitted to other third parties prior to implementation. The qualification went beyond reserving the right to use the phreatic groundwater for "environmental monitoring" and referred to "management" and to the implementation of a management plan.

[20] As the learned trial Judge observed:

It is not surprising that the existence of such a plan would be a precondition to the land being suitable for residential use. Without such a plan, particularly with respect to management of contaminated groundwater, the land might not be suitable for residential use because of the presence of that contaminated groundwater.

[21] In my opinion the Statement of Environmental Audit did not convey to a reasonable purchaser, a person without the expertise of an environmental auditor, confirmation that the Land was suitable for residential use and occupation. On its face the Statement qualified the opinion of the environmental auditor by requiring an appropriate plan for groundwater monitoring and management to have been submitted for approval by relevant authorities and, presumably, then implemented.

[22] Further, it is to be noted that the Statement of Environmental Audit provided to the respondents included a provision that the Statement was to be read as part of the environmental audit report. A reading of that report reveals the following disclaimer (at Section 14):

Opinions and judgments expressed herein are based on the Auditor's understanding of current regulatory standards and should not be construed as legal opinions. This document and the information contained herein have been prepared for the use of the client (BP Australia Pty Ltd), the Northern Territory Government and the relevant Planning Authority. Any reliance on this report by third parties shall be at such parties' risk.

[23] The purchasers were "third parties" for the purposes of the disclaimer and were expressly excluded from relying upon the report other than at their own risk. That is contrary to the purpose of the written confirmation to be provided pursuant to cl 31.3 of the contract.

[24] I see no error on the part of the learned trial Judge in concluding that the Statement of Environmental audit did not discharge the obligation of the appellant under cl 31.3 of the contracts.

[25] It was submitted on behalf of the appellant that the Statement of Environmental Audit was a confirmation of the Statement of Environmental Audit attached to the original contract. The learned trial Judge rejected a submission to that effect observing that the annexure to the contract was the provision of "preliminary information" relating to the Parent Parcel and that cl 31.3 required more than mere confirmation of that preliminary information. What was to be addressed in the "written confirmation" is spelled out in cl 31.3 which makes no reference to the earlier document.

[26] The appellant also complained that the learned trial Judge erred in interpreting cl 31.3 as requiring confirmation from the accredited environmental auditor to the purchaser rather than, as occurred in the present case, to a third party, namely BP Australia Pty Ltd. There was nothing in the document to indicate that the author was aware that the Statement might be relied upon by the respondents and, thereby, create a relationship with consequences at law between the author and the respondents. In addition, the disclaimer expressly limited the ability of the respondents to rely upon the Statement. A purpose of the Statement was to provide protection for the respondents in the event that the land was not fit for the purpose for which it was purchased. In order to create the necessary legal relationship it was necessary for the document to identify that the author was providing expert advice to be relied upon by the respondents. This would be achieved by addressing the document to the respondents or by

including some reference which made the position clear. In any event, as I have indicated, the Statement did not fulfil its primary purpose.

Ground 2: The exclusion of evidence

[27] At the hearing before the learned trial Judge the appellant sought to rely upon an affidavit sworn by the author of the Statement of Environmental Audit seeking to explain and clarify the Statement. The learned trial Judge excluded the whole of the affidavit explaining that the content of the Statement determined the rights and liabilities of the parties pursuant to cl 31.3 of the contract. Those rights and liabilities were not to be determined by any subjective intention of the author of the document which, at the time of presentation of the document and the purported rescission, was not communicated to the respondents and was unknown by them. This was not a matter where the common knowledge of the parties suggested there was any ambiguity in the document which required explanation.

[28] There was no error in excluding the evidence.

[29] The appeal should be dismissed.

SOUTHWOOD J:

[30] I agree with Riley J and have nothing further to add.

OLSSON AJ:

[31] I also agree and have nothing further to add.