Chin v Frances Park [2009] NTSC 20

PARTIES:	CHIN, Andrew AND CHIN, Chun Loi v FRANCES PARK (DARWIN) PTY LTD (ACN 090 382 219)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	53 of 2009 (20911320)
DELIVERED:	20 May 2009
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JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES

Contracts for the sale of land – failure of vendor to comply with terms of contract – termination of contract by purchaser – whether termination valid – held that plaintiffs were entitled to rescind contract and that termination of the contracts were valid.

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, discussed.
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, referred.

REPRESENTATION:

Counsel:

Plaintiffs:	A Wyvill
Defendant:	B O'Loughlin

Solicitors:

Plaintiff:	T S Lee and Associates
Defendant:	Cridlands MB Lawyers

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Chin v Frances Park [2009] NTSC 20
No. 53 of 2009 (20911320)

BETWEEN:

ANDREW CHIN
First Plaintiff

AND:

CHUN LOI CHIN
Second Plaintiff

AND:

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

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 20 May 2009)

Introduction

[1] In 2007 the parties entered into three contracts for the sale by the defendant to the plaintiffs of land within a subdivision known as the Frances Park Estate. The plaintiffs seek a declaration that they have validly terminated the contracts and an order for repayment of the deposits paid under the contracts amounting to a total of $64,000, together with any interest accrued thereon.

[2] For the reasons that follow, I have determined that the orders sought by the plaintiffs should be made.

Backgrounds Facts

[3] The essential facts are not in dispute. The land in question had been used as an oil storage facility operated by BP Australia Pty Ltd. The defendant purchased and subdivided the land. In effect, the plaintiffs signed contracts to purchase land "off the plan" of subdivision before titles were issued. The contracts were as follows:

Date	Old Lot No	Title Lot No	Deposit
11 January 2007	32	7715	$18,500
9 July 2007	59	7743	$22,750
9 July 2007	54	7738	$22,750

[4] On 17 December 2008 the defendant advised the plaintiffs that titles to the lots that were the subject of the contracts had been issued. It is agreed that completion of the contracts was then due on 31 December 2008, but the defendant allowed an extension on settlement until 5 January 2009. Settlement has not occurred.

[5] By letter of 30 January 2009 the plaintiffs purported to exercise their power of rescission with respect to each of the contracts. A number of grounds were advanced for the rescission, but in these proceedings reliance is placed

only upon a failure by the defendant to comply with cl 31.3 which is concerned with confirmation that the subject land is suitable for residential use. The defendant denies that there was a failure to comply with cl 31.3, but accepts that if the failure is established the right to rescind pursuant to the contracts was validly exercised.

Significant Terms of the Contracts

[6] The contracts were executed in the knowledge that past use of the land may have contaminated it and might be the subject of remedial works. In this context, two clauses were of significance. First, cl 11 excluded liability for any warranty or representations by the defendant in relation to the land:

> "**11. NO WARRANTIES OR REPRESENTATIONS**
>
> 11.1 The Purchaser expressly acknowledges and agrees with Frances Park as follows:
>
> (a) this Agreement contains all of the conditions and warranties pertaining to the sale and purchase of the Land;
>
> (b) no warranties, representations, assurances or conditions (other than those contained in this Agreement) are given by or on behalf of Frances Park in relation to the Land and all warranties, representations, assurances and conditions are excluded and negatived to the fullest extent permissible at law;
>
> (c) the Purchaser has agreed to purchase the Land and enters into this Agreement as a result of the Purchaser's own investigations and enquiries and in doing so has not relied on any warranty, representation or assurance given by or on behalf

of Frances Park (including any information contained in any brochure or other promotional material advertising or promoting the sale of the Land).”

[7] The second clause of importance is cl 31 upon which the plaintiffs relied for their rescission:

> “**31. REMEDIAL WORKS**
>
> 31.1 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."

[8] Annexure C to each contract was a summary of an "Environmental Auditor's Report" in respect of the land. Clause 31.1(b) recited that this summary was obtained by the defendant "with the intent of providing preliminary information regarding the environmental status and remediation" of the subject land. The summary was dated 13 April 2006 and stated that, "subject to [three] conditions", the land was suitable for use for mixed residential living. The summary also stated that the Report was not unconditional because groundwater in wells in the

vicinity of the land was polluted “with elevated levels of some heavy metals”.

The relevant part of the summary was as follows:

> “HEREBY STATE that I am of the opinion that
>
> The site is suitable for the beneficial uses associated with:
>
> - mixed residential living
>
> - all uses permitted under the Darwin Town Plan 1990, as amended on 15 March 2006, for Specific Use (SU52) 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) An appropriate Groundwater Monitoring and Management Plan (GMMP) for the Terminal should be prepared, and submitted for approval by a Victorian EPA accredited Environmental Auditor, prior to implementation. A review of the programme should be undertaken by the auditor periodically, and the programme should be continued until the auditor is satisfied that the groundwater no longer poses unacceptable risks.
>
> (iii) All imported fill materials should preferably be from certified clean sources (eg natural quarried materials), and should be subject to verification testing to ensure their suitability for use. Details of the verification testing program, such as the frequency of testing and the range of analytes, should be submitted to a Victorian EPA accredited Environmental Auditor for approval, and verification test results should be forwarded to the auditor for approval prior to acceptance of the material on site.
>
> 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 in the vicinity of the site, with elevated levels of some heavy metals."

The Issues

[9] At the heart of the dispute is whether the defendant complied with cl 31.3 by providing to the plaintiffs the written confirmation described in cl 31.3. The defendant submitted that compliance with cl 31.3 occurred when, by letter of 11 December 2008, solicitors for the defendant sent to the plaintiffs a document dated 28 June 2007 headed "Statement of Environmental Audit". That Statement was in terms very similar to the summary annexed to the contract and was written by the same author. The Statement was as follows:

"STATEMENT OF ENVIRONMENT 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 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." (my emphasis)

[10] In essence, the plaintiffs submitted that the Statement of 28 June 2007 did not amount to written confirmation pursuant to cl 31.3 that the land was suitable for residential use and occupation because cl 31.3 permitted only one condition, namely, that there be no use of phreatic groundwater other than for the purpose of environmental monitoring. The Statement contained a second condition concerning the submission of a Groundwater Monitoring and Management Plan (GMMP) for approval by a specified auditor. In addition, the plaintiffs submitted that the Statement could not fulfil the requirement of cl 31.3 because it was prepared for BP Australia Pty Ltd and did not amount to "written confirmation" "to the Purchaser" for the purposes of cl 31.3.

Discussion

[11] The first task is to construe cl 31.3 having regard to the purpose of the contract, circumstances associated with the contract known to the parties and the context in which cl 31.3 appears. This is not the occasion for a discussion of the development of the law of contract in Australia following the statement of principles by Lord Hoffmann in *Investors Compensation*

Scheme Ltd v West Bromwich Building Society.[1] For present purposes the principle was succinctly stated in the judgment of the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*:[2]

> "This Court, in *Pacific Carries 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 Carries Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22]].

[12] The "surrounding circumstances" include the significant fact that the land had previously been used for purposes which had or were likely to have resulted in contamination of the land thereby rendering the land unfit for residential purposes. The land was being subdivided with the intention that lots would be sold for residential purposes. By cl 11 of the contract the vendor excluded any warranties or assurances given by the vendor in relation to the land and, by cl 31.1, had also excluded liability for the contents of the environmental auditor's report. Against this background, the primary purpose of cl 31.3 is readily ascertained as providing the purchasers with an assurance that, subject to phreatic groundwater not being used for

[1] [1998] 1 WLR 896 at 912-913.
[2] (2004) 219 CLR 165 at [40].

any purpose other than environmental monitoring, the land being purchased by the purchasers was fit for the intended use, namely, "residential use and occupation".

[13] The defendant submitted that the Statement annexed to the contract was a Statement that the "land was suitable for residential living, subject to no use of groundwater and its monitoring". In these circumstances the defendant argued that cl 31.3 "merely required confirmation of this statement prior to completion of the sale".

[14] I do not agree. The purpose of the Statement annexed to the contract is expressly identified in cl 31.1(b) as the provision of "preliminary information regarding the environmental status and remediation of the Parent Parcel". Clause 31.3 required more than mere "confirmation" of the Statement annexed to the contract.

[15] In the knowledge of the "surrounding circumstances" to which I have referred and the purpose of the contract, a reasonable person would understand cl 31.3 to require that the "written confirmation" of suitability for residential use and occupation be subject to only one proviso, namely, that phreatic groundwater not be used for any purpose other than environmental monitoring. The Statement provided by the vendor to the purchasers contained a second proviso that a "Groundwater Monitoring and Management Plan" be prepared by BP Australia, an entity that was not a party to the contract. Further, that Plan had to be submitted for approval.

Whatever may have been the subjective intention of the author of the Report, in its terms the confirmation of suitability for residential use was expressed as being "subject to" this second "condition". The defendant presented this Statement to the plaintiffs without qualification. The terms of the Statement were unequivocal. From the perspective of a reasonable purchaser, the Statement conveyed a clear message that the land was not suitable for residential use unless an appropriate plan for groundwater monitoring and management had been submitted for approval. In substance, without the appropriate Groundwater Monitoring and Management Plan being in place, the land was not suitable for residential use.

[16] 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.

[17] As I have said, in my view these conclusions follow from the terms of the Statement. The defendant sought to tender an affidavit of the author of the Statement explaining the intention of the author with respect to the second "condition" and its relevance or otherwise to the suitability of the land for residential use. I declined to admit the affidavit. While the Statement was not part of the contract, the content of the Statement determined the rights and liabilities of the parties to the contract pursuant to cl 31.3. Those rights and liabilities are not to be determined by the subjective intention of the

author which, at the time the Statement was presented by the defendant, was unknown to the plaintiffs.

[18] In my opinion, viewed objectively, and viewed subjectively from the point of view of the purchaser, the Statement did not satisfy cl 31.3 because of the existence of the second "condition". In these circumstances, the plaintiffs were entitled to rescind the contract and did so validly.

[19] The second aspect of the plaintiffs' submission concerns the failure to provide a written confirmation specifically addressed to the purchasers. The statement was prepared at the request of BP Australia and there is no evidence from which it can reasonably be inferred that the author of the Statement was aware that the Statement would or might be used by the vendor of the subdivided lots to satisfy concerns of purchasers concerning the environmental status of the land. This was a Statement which the author knew would be used by BP in its dealings with environmental authorities and parties who might deal with BP.

[20] Read literally, cl 31.3 does not require that the written confirmation be addressed to the purchaser. Clause 31.3 requires that the vendor provide to the purchaser written confirmation of suitability. Read literally, written confirmation addressed to BP would suffice. The defendant submitted that to require the written confirmation to be addressed to the purchasers would

amount to implying a term into cl 31.3 in circumstances where implication of such a term is not justified.[3]

[21] The plaintiffs submitted that cl 31.3 should be read in the context of the exclusions of liability on the part of the vendor in respect of any representation concerning the land and its environmental status. In these circumstances a reasonable person in the position of the purchasers would believe that in order to comply with cl 31.3, it was necessary that the written confirmation from an accredited environmental auditor be in terms creating a legal liability on the part of the author of the written confirmation for negligent misstatement. In the absence of such a legal relationship between the author and the purchasers, the latter would be left without any protection or recourse whatsoever should the land not be fit for residential purposes.

[22] Clause 31.3 required that written confirmation of suitability for purpose be "provided to the purchaser" by the vendor. However, cl 31.3 specifically recognised that the written confirmation was to emanate from a specified third party who was not a party to the contract. Notwithstanding that cl 31.1(c) encouraged the purchaser to obtain its own advice in relation to the environmental status of the land, a reasonable person with knowledge of the surrounding circumstances would understand that cl 31.3 was intended to provide reassurance to the purchaser that the land was suitable for purpose. More particularly, it was intended to provide reassurance from an appropriate source.

[3] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

[23] In these circumstances, in my view cl 31.3 should be construed as requiring reassurance from the appropriate source to the purchaser and a statement to BP Australia did not satisfy that requirement. As I have said, there is no basis in the material before me to found a reasonable inference that the author was aware that the Statement to BP Australia might be relied upon by persons dealing with the land either as vendor or purchaser after BP Australia had divested itself of the land.

Conclusions

[24] For these reasons, in my opinion the plaintiffs were entitled to rescind the contract pursuant to cl 31.4. As I have said, the defendant conceded that if the plaintiffs were entitled to rescind, they validly exercised that right.

[25] There will be a declaration that the plaintiffs validly terminated the contracts and an order for repayment of the deposits and any interest accrued thereon.
