

16/84

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. LTD. Respondent
(Plaintiff)

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CASE FOR THE APPELLANT

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1. This case is divided into Parts as follows:-
 - Part A - Introduction (paragraphs 2 to 6)
 - Part B - Contractual background (paragraphs 7 to 16)
 - Part C - The relevant provisions of Section 49 (paragraphs 17 to 28)
 - Part D - Instances of alleged non-compliance with Section 49(2) and the Full Court's findings thereon (paragraphs 29 to 32)
 - Part E - The Appellant's submissions on the instances of alleged non-compliance and its consequent avoidance of the Contract (paragraphs 33 to 54)
 - Part F - The reasons of appeal (paragraph 55)

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PART A - INTRODUCTION

2. The Appellant was the purchaser from the Respondent by Contract bearing the date 27th May, 1981, of a proposed lot in a Building Units Plan to be registered under the "Building Units and Group Titles Act, 1980" (hereinafter termed "the Act"), in respect of a multi-storey apartment building to be called "Sunbird Plaza" and to be constructed at the City of Gold Coast in the State of Queensland. p.9

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3. The Appellant's contention has been, and is, p.63

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that it effectually terminated the Contract prior to settlement, in exercise of a right to "void" the Contract given it by S.49(5) of the said Act. The Respondent obtained an Order for the specific performance of the Contract on an application for summary judgment (pursuant to Order 18A of the Rules of the Supreme Court) which was heard by Mr. Acting Justice G. N. Williams on 20th September, 1982.

p.93 4. The Appellant appealed to the Full Court of the Supreme Court of Queensland against that Order, and the Full Court on 10th February, 1983 ordered that the appeal be dismissed. 10

p.94 5. This appeal is brought against such judgment of the Full Court pursuant to leave to appeal granted to the Appellant by the Full Court on 2nd March, 1983.

6. The Appellant's claims turn essentially upon the construction of S.49 of the Act.

PART B - CONTRACTUAL BACKGROUND

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p.9 7. The Contract bears the date 27th May, 1981 and provides for the purchase by the Appellant of an estate in fee simple in unit number 14A on the fourteenth floor of a building to be called "Sunbird Plaza" and to be constructed at the City of Gold Coast.

p.10 8. Clause 8(a) of the Contract provides that title to the said unit was or would be subject to the provisions of the Act. Section 8(1) of the Act permits the subdivision of multi-storey buildings into lots and common property by registration of a Building Units Plan. 30

p.9 9. Clause 3 of the Contract provided that settlement should take place within fourteen (14) days after notice from the Respondent or its Solicitors to the Appellant or its Solicitors that the relevant Building Units Plan had been registered at the Real Property Office, Brisbane.

p.9 10. The purchase price payable under the Contract was \$148,500.00 of which 10% was payable (and paid) by way of deposit on the signing of the Contract (cl. 2(a) 1(a), and the balance on completion (cl. 2(a) 1(c)). 40

p.6 11. The relevant Building Units Plan was registered on 10th June 1982.

p.24 12. Notice of such registration was given by the Respondent's Solicitors to the Appellant's then Solicitors by telegram dated 10th June, 1982,

and 25th June, 1982 (between 10 a.m. and 5 p.m.) was the date appointed for settlement.

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13. On 18th June, 1982 the Appellant instructed its Solicitors to serve a Notice of Avoidance of the Contract, pursuant to S.49(5) of the Act, and such Notice was served upon the Solicitors for the Respondent on 24th June, 1982. A further Notice of Avoidance, referring to additional instances of alleged non-compliance with S.49 of the Act, was served on the Respondent's Solicitors on 3rd August, 1982.

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14. The right of avoidance relied on as justifying the termination of the Contract effected on 24th June, 1982 is that conferred by S.49(5) of the Act.

15. To obtain leave to defend the Respondent's claim for specific performance, the Appellant had to "show cause" (Order 18A Rule 4(1) Rules of the Supreme Court). Affidavits were filed on the Appellant's behalf by which, it is respectfully submitted, the Appellant did show cause in the relevant sense.

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16. Before specifying the detail of the Appellant's defence it is convenient to refer to the relevant provisions of the Act.

PART C - THE RELEVANT PROVISIONS OF SECTION 49

17. S.49(5)(a) provides that if "the original proprietor" fails to give to a purchaser a statement in compliance in every respect with subsections (1), (2) and (3) of S.49, the purchaser may "void" the Contract within thirty (30) days after he first becomes aware of the failure.

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18. The term "original proprietor" is defined by S.49(11) to include "in respect of a proposed lot or proposed plan, the person who upon registration of the proposed plan becomes the original proprietor". It is common ground in this case that "the original proprietor" was at all material times the Respondent.

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19. The onus of proving that the statement referred to in S.49(2) was duly given lay upon the Respondent (S.49(10)).

20. Contracting out of the requirements of the section is prohibited (S.49(9)).

21. Avoidance of a Contract pursuant to S.49(5) may take place even after registration

of a transfer in favour of the Purchaser (S.49(8)).

22. Any moneys paid by a purchaser to the original proprietor are, upon "voidance", repayable to the purchaser by the original proprietor (S.49(6)).

23. The requirements of subsections (1), (2) and (3) of S.49 are cast in mandatory terms.

24. Subsection (1) obliges the original proprietor to give the statement in writing to the purchaser of a proposed lot, and the requirement is that such statement be given "in compliance in every respect with the requirements of this section". 10

25. The contents of the statement are prescribed by subsection (2), and subsection (3) prescribes the manner by which the statement may be given. In prescribing the contents of the statement S.49(2) deals with a number of matters which would ordinarily be considered as of varying significance. However S.49(5) does not distinguish between those matters, and accords a right of voidance in the event of non-compliance in any respect whatever with subsection (2). 20

26. S.49(3) provides that the statement may be given to a purchaser before he signs a Contract, or that it may form part of such Contract.

27. In this case no document separate from the form of Contract was given to the purchaser, and it is the Contract which contains the statement relied upon by the Respondent to satisfy the requirements of S.49(1), (2) and (3). The "statement" is to be found in the eleventh schedule to the Contract, which schedule is headed "statement by original proprietor pursuant to Section 49 of the 'Building Units and Group Titles Act 1980'". 30
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28. The case could not be said to fall within S.49(3)(a) because when the copies of the Contract were forwarded to the purchaser for execution in April, 1981, the eleventh schedule was undated and unsigned. 40
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PART D - INSTANCES OF ALLEGED NON-COMPLIANCE WITH SECTION 49(2) AND THE FULL COURT'S FINDINGS THEREON

29. Those instances of alleged non-compliance to be relied on in this appeal, and the Full Court's

findings thereon, are as follows:

30. 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)).

The Court held, Campbell C.J. dissenting, that there had not been compliance with this requirement, but that the Appellant was nevertheless denied the protection of S.49(5) because it had not (as the Court found) led any evidence as to when it became aware of "the fact that the third schedule to the Contract failed to set out the proposed by-laws in full".

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

The Court held, Matthews J. dissenting, that the statement complied with this requirement, in that the statement elsewhere in the Contract of the address of the Respondent's Solicitors was to be regarded as a statement of the address of the original proprietor for the purposes of S.49(2)(b).

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

The Court held, Matthews J. dissenting, that the statement satisfied this requirement in that, since the statement formed part of the Contract, the date required to be stated by S.49(2)(f) as the date on which the statement was given was the date of the Contract itself, which date appeared in the Contract even though not in the eleventh schedule.

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PART E - THE APPELLANT'S SUBMISSIONS ON THE INSTANCES OF ALLEGED NON-COMPLIANCE AND ITS CONSEQUENT AVOIDANCE OF THE CONTRACT

33. 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)).

It is respectfully submitted that the majority of the Full Court was correct in its conclusion that this requirement had not been complied with.

34. The eleventh schedule to the Contract provides:

"5. By-Laws: In accordance with the third schedule to the subject agreement subject only to the provisions of condition 8(h)(i) of the subject agreement."

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The third Schedule to the Contract sets out 25 by-laws proposed to be added to the by-laws set forth in the Third Schedule to the Act: the third schedule to the Contract does not however set out the 21 by-laws contained in the Third Schedule to the Act.

35. It is respectfully submitted that an attempted incorporation of the Third Schedule (Act) by-laws by mere reference could not result in their being "set out" in the statement. This submission is consistent with Evans v. Chrichton-Browne (1981) 147 C.L.R. 169, 208. 10

36. It is submitted that the proposed by-laws could not be said to "accompany" the Statement. It is unlikely that the extent of the obligation of the original proprietor or the degree of notice to be given to the purchaser would differ, depending on whether the original proprietor chose to fulfil his obligation by "setting out" the by-laws or by having them "accompany" the statement. For by-laws to "accompany" a statement, the whole of such by-laws must surely be given with the statement. 20

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

The address of the original proprietor is not stated in the eleventh schedule to the Contract. The majority in the Full Court (Matthews J. dissenting) held that this deficiency was remedied by the subsequent reference in the Contract to the address of the vendor's Solicitors. The substance of the argument put to the Full Court by the Respondent, and accepted by the majority was that the statement, when forming part of the Contract, need not be self-contained, and that any deficiencies could be supplemented by reference to other parts of the document. 30

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38. In this case however the Respondent expressly nominated the eleventh schedule as being the "Statement by original proprietor pursuant to Section 49 of the 'Building Units and Group Titles Act 1980'". It is inconsistent with that for the Respondent to require, in effect, the Appellant to look elsewhere in the Contract document for other parts of the S.49 "statement". 40

39. Aspects of S.49 supporting the contention that the "statement" must be self-contained, containing within its physically discernible limits all of the matters required to be stated by subsection (2), are the following: 50

(a) where S.49 intends that information

may be given dehors the statement,
it says so:
cf. subsection (2) (c), (d), (e);

(b) subsection (3) (a) contemplates a discrete statement, and there is no reason to suppose that, if the statement forms part of the Contract (subsection (3)(b)), the contents of the statement might be scattered through the Contract document;

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(c) the information to be stated is of small scope, and could be included (subject to subsection (2)(c), (d), (e)) with ease in a self-contained part of the Contract, readily recognisable as such by the purchaser;

(d) the continual reference in S.49 is to "a statement in writing", in the singular.

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40. The observation by McPherson J. to the effect that the burying of the required matter in the fine print of the Contract may have the consequence that such matter did not constitute a statement, assists in illustrating the difficulty inherent in accepting that the statement need not be self-contained.

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41. The fact that the name of and an address for the Respondent's Solicitors appears at the foot of the Contract cannot assist the Respondent if the statement is required to be "self-contained". The name and address of the Respondent's Solicitors is not within the statement: it is at the very foot of the Contract. In any case the Contract distinguishes between the address of the vendor (original proprietor) and the address of its Solicitors' usual place of business (cl.19) rendering it difficult properly to regard the latter as equivalent to the former.

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

The Respondent bore the onus of proving that the statement was "duly given" (S.49(10)). The Respondent adduced no evidence of the date on which the statement was given. The eleventh schedule refers only to 27th May, 1981 as being the "date of this statement". The Full Court by majority (Matthews J. dissenting) held in effect that a date was stated as the date on which the statement was given, being the date of 27th May, 1981 as specified on the first page of the

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Contract as the date of the Contract (the date on which the Contract was entered into being the date on which a statement "forming part of" that Contract was "given").

43. The evidence established, however:

(a) that 27th May, 1981 was probably not the date on which the Contract was entered into: the only evidence concerning any communication to the Appellant of the Respondent's acceptance of the offer of purchase was evidence of the despatch to the Appellant of the executed Contract, not received by the Appellant's Solicitors until 1st June, 1981; and

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(b) that prior to 1st June, 1981, the Appellant was last in possession of the unexecuted Contract (including the unsigned eleventh schedule) in early April, 1981.

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44. Accepting the approach of the majority in the Full Court leave to defend should therefore have been given either because:

(a) the date of 27th May, 1981 was demonstrated not to have been the date on which the Contract was entered into; or

(b) the Respondent failed to discharge its onus of proof under S.49(10).

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45. It is however respectfully submitted that the reasoning of Matthews J. is to be preferred, His Honour saying:

"There is little room to doubt that the statement (whichever means of giving it be adopted) is not 'given' to a purchaser until it is received by him..."

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46. The majority in the Full Court was apparently influenced against a literal construction of S.49(2)(f) by practical difficulties which it was thought would result. That approach is, with respect, of doubtful validity (cf. Australian Softwood Forests Pty. Ltd. v. Attorney-General (N.S.W.) (1981) 55 A.L.J.R. 659, 662). In any case there would, it is submitted, have been no particular difficulty in dating the statement subsequently to the purchaser's execution of the Contract.

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47. The Appellant's avoidance consequent upon such non-compliance

The Full Court determined that judgment was correctly entered summarily against the Appellant because the Appellant had not led any evidence as to when it became aware of the non-compliance found to have occurred, namely, "the fact that the third schedule to the Contract failed to set out the proposed by-laws in full", and had thereby failed to establish that it voided the Contract within thirty (30) days of first becoming aware of the relevant failure.

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48. It is respectfully submitted that the Full Court must have overlooked, or paid insufficient regard, to the following evidence (inter alia) led on behalf of the Appellant:

(a) of its Director M. M. Cussan, that on 18th June, 1982 the Defendant became aware that the S.49 statement was defective, in that it failed to comply, inter alia, with S.49(2);

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(b) of its former Solicitor M. F. Elliott, who had had the carriage of the matter for the Appellant from the outset, that he first became aware of any defect in the S.49 statement on 18th June, 1982;

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(c) of its later Solicitor L. L. Phelps that she became aware of further defects in the S.49 statement on 3rd August, 1982.

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49. The Full Court held that a person "becomes aware of the failure" to give a statement in compliance in every respect with S.49(1), (2) and (3) (cf. S.49(5)) "when he knows the facts which disclose a breach" (per Matthews J.). Even accepting that construction, it is submitted that the evidence led for the Appellant sufficiently raised a triable issue of fact.

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50. The Appellant submits however that the awareness to which S.49(5) refers is an awareness of both the omission from the statement of prescribed information, and that such omission constitutes a failure to comply with S.49(2). S.49(5) refers to the purchaser's becoming "aware of the failure". That is failure on the part of the original proprietor to give to a purchaser "a statement in compliance in every respect with subsections (1), (2) and (3)". It is that "awareness" which triggers the operation of the

subsection. In other words, the purchaser must become aware of the requirements of the section and of non-compliance with them. Only then can the purchaser be said to be aware of the original proprietor's "failure" to comply with the section.

51. Insofar as two Notices of Avoidance were given by the Appellant (cf. paragraph 13 hereof) it is submitted that the Appellant may rely on the grounds raised by the second Notice as supporting the validity of the first Notice: Shepherd v. Felt & Textiles of Australia Ltd. (1931) 45 C.L.R. 359. 10

52. The appropriateness of entering judgment summarily

The Appellant submits that the summary entry of judgment in these circumstances was inconsistent with authority, having regard to:

- (a) the factual issues raised by the Appellant's Affidavits; 20
- (b) the failure of the statement to comply with S.49; and
- (c) the novelty and difficulty of the factual and legal issues raised;

and that it should have been permitted to litigate those issues at a trial.

53. At the time of the hearing of this matter at first instance there was no reported decision on the construction of the presently relevant provisions of Section 49. This was one of the first actions in the Supreme Court in which defences based on such provisions of Section 49 were raised and argued. 30

54. Reference is made to Caltex Oil (Aust.) Pty. Ltd. v. Bawden (1979) Qd.R. 62, 64-6 (Full Court), Ritter and Anor. v. Northside Enterprises Pty. Ltd. (1975) 132 C.L.R. 301, 303, and the following passage in Australian Can Co. Pty. Ltd. v. Levin & Co. Pty. Ltd. (1947) V.L.R. 332, 334 (Full Court, per Lowe J.): 40

"From the point of view of the Defendant, it has been said that he is entitled to leave to defend if there is a 'triable issue' - Jacobs v. Booth's Distillery (1901) 85 L.T. 262. In Clarke v. The Union Bank (1917) 23 C.L.R. 5, the High Court expressed the view that leave to defend should be given if there was 'an

arguably good defence' and in Cloverdell Lumber Co. Pty. Ltd. v. Abbott (1924) 34 C.L.R. 122 Isaacs J. approved a statement'..... that such leave should be given where the Defendant has any plausible ground of defence'. The matter is rather differently expressed by Brett L.J. in Ray v. Barker (1879) 4 Ex.D. 279 at 283 where he said that leave should be given to defend if facts were shown leading to 'the inference that at the trial of the action he (i.e. the Defendant) may be able to establish a defence' while in Harrison v. Bottenheim (1878) 26 W.R. 362 it was said that such leave should be given if the Defendant 'was shown enough to entitle him to interrogate'. From all this it appears that where there is a real case to be investigated either in fact or in law leave to defence should be given."

PART F - THE REASONS OF APPEAL

55. The Appellant respectfully submits that the orders and judgment of the Full Court were wrong and ought to be reversed, and that this appeal ought to be allowed with costs for the following, among other, reasons:-

- (a) the Full Court was wrong in finding that the Respondent gave a statement complying with S.49 (2)(b) and (f) of the Act;
- (b) the Full Court was wrong in holding that the Appellant had not established that it gave notice of "voidance" pursuant to S.49(5) of the Act within thirty (30) days after first becoming aware of the Respondent's failure as therein referred to;
- (c) the Full Court was wrong in holding that there was no evidence as to when the Appellant first became aware of such failure;
- (d) the Full Court was wrong in holding that the Appellant had not "shown cause" against the entry of summary judgment for specific performance.

PAUL DE JERSEY Q.C.
JOHN MUIR

