

Boheto Pty. Ltd.

Appellant

v.

Sunbird Plaza Pty. Ltd.

Respondent

FROM

THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

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REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL OF THE 12TH MARCH 1984,  
DELIVERED THE 1ST MAY 1984

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*Present at the Hearing:*

LORD DIPLOCK  
LORD WILBERFORCE  
LORD KEITH OF KINKEL  
LORD BRIGHTMAN  
LORD TEMPLEMAN

*[Delivered by Lord Templeman]*

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The Queensland Building Units and Group Titles Act 1980 makes provision for the registration of a plan for the division into lots and common property of land including a building intended to be erected and to be sold off in separate apartments, units or lots subject to and with the benefit of rights and liabilities in relation to the maintenance, amenities and administration of the building and common parts.

The Act incorporates the proprietors from time to time of the lots comprised in the plan and imposes on the original proprietor, the owner and developer of the site of the building, the duty of furnishing the purchaser of each lot with prescribed details of the nature and extent of the plan, the initial arrangements made for the management, service and maintenance of the building and the initial by-laws imposing restrictions on the use and occupation of each lot in the interests of all the proprietors.

In particular section 49(1) of the Act requires that:-

"(1) An original proprietor shall give to the purchaser of a lot or of a proposed lot a

statement in writing in compliance in every respect with the requirements of this section."

By section 49(2) the required statement must *inter alia*:-

"(b) state the names and addresses respectively of the original proprietor and the purchaser;"

and

"(e) set out or be accompanied by the by-laws in force in respect of the plan or the proposed by-laws in respect of the proposed plan;"

By Section 30 "...the by-laws set forth in the third schedule shall be the by-laws in force in respect of each plan" subject to the power conferred by the same section on the body corporate of proprietors to make alterations and additions to the by-laws set forth in the third schedule to the Act.

By section 49(3) the statement in writing required by sections 49(1) and (2) must either be given by the original proprietor to the purchaser before the purchaser signs any contract or must form part of the contract.

By section 49(4) if, at any time after the original proprietor has furnished the requisite statement in writing and before the purchaser is registered as the proprietor of his lot, there is any change in the initial arrangements for the management, services or maintenance of the building or any change in the by-laws or plan of the building, the original proprietor must forthwith give notice of the change to the purchaser who, if his rights have been materially affected, may rescind from his contract.

Section 49(5) provides that:-

"If the original proprietor fails to give to a purchaser -

- (a) a statement in compliance in every respect with sub-sections (1), (2) and (3); or
- (b) a notice prescribed in sub-section (4),

the purchaser may void the contract...by notice in writing given to the original proprietor within 30 days after he first becomes aware of the failure;"

By a contract dated 27th May 1981 the respondent original proprietor Sunbird Plaza Pty. Ltd. agreed to sell and the appellant purchaser Boheto Pty. Ltd. agreed to buy lot 52 on the 14th floor of a building proposed to be erected in accordance with a building unit plan which was to be registered under the 1980 Act before completion by the purchaser of his purchase.

The eleventh schedule to the contract consisted of a statement in writing forming part of the contract and expressed to be made pursuant to section 49 of the 1980 Act. That statement did not give particulars of the address of the vendor, the original proprietor, as required by section 49(2) of the Act. That statement indicated that the relevant by-laws were to be in accordance with the third schedule to the contract subject to certain powers of amendment reserved by the contract. The third schedule to the contract was headed "Proposed alterations to third schedule by-laws" and stated that subject to the power of amendment reserved by the contract:-

"....the vendor shall as sole proprietor upon registration of the subject Building Units Plan add to the third schedule by-laws as set out in the Act the following by-laws:-"

There then followed 25 additional by-laws restricting the use and occupation of each lot. The contract did not "set out" and was not "accompanied by" details of the contents of the statutory by-laws contained in the third schedule to the 1980 Act.

After execution by the vendor and the purchaser, the contract dated 27th May 1981 was received by the purchaser's solicitors on 1st June 1981. For the purposes of this appeal, their Lordships accept, without deciding, that the vendor failed to give to the purchaser a statement in writing which complied in every respect with the requirements of section 49(1), (2) and (3) of the 1980 Act. The proposed Building Units Plan was duly registered under the 1980 Act on 10th June 1982. The vendor called upon the purchaser to complete the purchase on 25th June 1982. The purchaser asserts that until 18th June 1982 the purchaser was not aware that the vendor had failed to give a statement in compliance in every respect with section 49. By a notice in writing dated 24th June 1982, the day before completion, the purchaser resiled from the contract on the grounds that the purchaser had first become aware on 18th June 1982 that the vendor as original proprietor had failed to give to the purchaser a statement in compliance in every respect with section 49 in that the contract failed to state the address of the original proprietor and failed to set out the proposed by-laws in full. No doubt the market value of the lot on 24th June 1982 was less than the contracted purchase price of \$148,500.

The vendor rejected the purchaser's claim that the contract had been avoided and issued proceedings for specific performance asserting that even if the vendor had failed to comply with the requirements of section 49 the purchaser first became aware of that failure when the purchaser's solicitors received the executed contract on 1st June 1981 and therefore the

power of avoidance under section 49(5) of the 1980 Act had terminated at the end of June 1981 long before the purchaser purported to avoid the contract.

For the purposes of this appeal their Lordships accept, without comment, that the purchaser and the purchaser's solicitors were, between 1st June 1981 and 18th June 1982, unaware of the contents or effect of section 49 of the 1980 Act or did not understand that the contract dated 27th May 1981 did not comply, and that the vendor had failed to comply, in every respect with the provisions of section 49. In these circumstances the contract was voidable from 1st June 1981 but the purchaser did not appreciate that the contract was voidable until 18th June 1982.

By an order of Williams A.J. dated 20th September 1982 sitting in the Supreme Court of Queensland the vendor obtained summary judgment for specific performance. The purchaser appealed against the order and sought leave to defend the action. The Full Court of the Supreme Court of Queensland (Sir Walter Campbell C.J., Matthews and McPherson JJ.) dismissed the purchaser's appeal on 10th February 1983. On 2nd March 1983 leave was granted to the purchaser to appeal to Her Majesty in Council.

In proceedings entitled *Deming No. 456 Pty. Ltd and Others v. Brisbane Unit Development Corporation Pty. Ltd.* ("the *Deming Case*"), in judgments delivered on 16th November 1983, the High Court of Australia on appeal from the Full Court of the Supreme Court of Queensland held by a majority that a purchaser did not become aware of the failure of an original proprietor to comply with section 49 of the 1980 Act until the purchaser acquired knowledge of the provisions of section 49 and appreciated the meaning and effect of those provisions and understood that the original proprietor had failed to discharge the obligations imposed on him by section 49. This surprising construction of the 1980 Act was not surprisingly corrected by the Building Units and Group Titles Act Amendment Act 1983 which became law on 22nd December 1983. The question is whether the 1983 Act governs this present appeal.

The 1983 Act repealed section 49(5) of the 1980 Act as amended by the Companies (Consequential Amendments) Act 1981. The 1981 Act amendments are not material. The 1983 Act substituted a new section 49(5). The amended form of section 49(5) applied to all contracts made after, and was expressly made applicable to all contracts made before, the 1983 Act and avoided on or after the date on which the Bill for the 1983 Act was introduced into the Legislative Assembly. The amended form of section 49(5) does not therefore apply to the present contract which was avoided before the 1983 Act became necessary. The

original form of section 49(5) to be found in the 1980 Act applies to the present dispute.

The 1983 Act also amended the 1980 Act, as amended by the 1981 Act, by inserting after section 49 the following new section:-

"49A. Interpretation of awareness in section 49(5). For the purposes of -

(a) the avoidance of any contract, agreement or other document to which section 49(5) applies; or

(b) the giving of judgment or of a decision by any court, after the commencement of the Building Units and Group Titles Act Amendment Act 1983, upon the application of section 49(5) of the Building Units and Group Titles Act 1980 to the avoidance of a contract, agreement or other document, whenever the proceedings in which the judgment or decision is to be given were commenced,

the purchaser under the contract, agreement or other document shall be taken to have been aware at all times of the provisions of section 49 or, as the case may be, section 49 of the Building Units and Group Titles Act 1980, and of the obligations of an original proprietor thereunder, and to have read any statement or notice given to him, being a statement or notice required by the section to be given to him, at the time when he received it."

Sub-paragraph (a) of section 49A deals with the avoidance of any contract which was made before or after the 1983 Act and which was avoided after the date when the Bill for the 1983 Act was introduced into the Legislative Assembly. Sub-paragraph (b) has, and must have, a different effect. Sub-paragraph (b) requires "any court" which gives "a decision" after 22nd December 1983, upon the application of section 49(5) of the 1980 Act, to make certain specified assumptions. It matters not when the proceedings in which the decision is to be given were commenced. In the present case their Lordships must now give a decision upon the application of section 49(5) of the 1980 Act to the avoidance of the contract dated 27th May 1981.

In advising Her Majesty as to the correct decision in the circumstances, their Lordships must assume, as directed by section 49A inserted by the 1983 Act, that the purchaser was aware at all times of the provisions of section 49 of the 1980 Act (as originally enacted) and of the obligations of the vendor thereunder and must be assumed to have read the statement contained in the contract dated 27th May 1981 on the date, namely 1st June 1981, when the contract was received by the purchaser's solicitors.

On those assumptions the purchaser must be deemed first to have become aware of the failure of the vendor to give a statement in compliance in every respect with section 49(1), (2) and (3) on 1st June 1981 and ceased to be entitled to avoid the contract 30 days thereafter.

Sub-paragraph (a) of section 49A applies to the avoidance of contracts entered into after the commencement of the 1983 Act on 22nd December 1983, and also to the avoidance of contracts made at any time before 22nd December 1983 and avoided on or after the date on which the Bill for the 1983 Act was introduced into the Legislative Assembly. Sub-paragraph (b) of section 49A governs the decision of any court given after 22nd December 1983 in proceedings instituted before 22nd December 1983 concerning a contract made before the 1983 Act was introduced as a Bill into the Legislative Assembly. In deciding whether any such contract was avoided under section 49(5) of the 1980 Act prior to the amendment of that Act, the court must assume that the purchaser was at all times aware of the provisions of section 49 and that he read and understood any statement or notice when he received it. If the statement was not given or was defective, the purchaser's right to avoid the contract ceased 30 days after the date of the contract. If the notice was not given or was defective the purchaser's right to avoid the contract ceased 30 days after he became aware of the event which made the notice necessary.

On behalf of the purchaser it was submitted, and there is a wealth of authority to prove, that the court will not give retrospective effect further than is necessary to comply with the plain meaning of a statute. Following this principle, it was argued that paragraph (b) of section 49A only applies to a contract which was avoided after 22nd December 1983, the date when the 1983 Act came into force. But such a limitation would stultify paragraph (b) of section 49A and is inconsistent with the requirement that every decision of any court after 22nd December 1983 must be made on the assumptions which the High Court of Australia declined to make in the *Deming Case*. Section 49A being clearly retrospective in its operation, and an intention having been shown that the Act should operate on pending proceedings, an appellate court is bound to give effect to it accordingly. See *Attorney-General v. Vernazza* [1960] 3 All E.R. 97 at 101.

It was also argued that section 49A does not require the court to assume that the purchaser who was aware of the provisions of section 49 and who read his contract would fully appreciate their respective meaning and effect. But a purchaser who is deemed to read must be deemed to understand and in

any event the 1983 Act requires the court to assume also that the purchaser was aware at all times of the obligations of the original proprietor.

Finally it was argued that the Board is not a court and does not give a decision for the purposes of section 49A of the 1983 Act. By section 3 of the Judicial Committee Act 1833:-

"All appeals....brought before His Majesty or His Majesty in Council from....[the] order of any court....shall....be referred....to the said Judicial Committee of His Privy Council, and such appeals....shall be heard by the said Judicial Committee, and a report....thereon shall be made to His Majesty in Council for His decision thereon...."

A decision on appeal from Queensland is an exercise of:-

"...the inherent prerogative right and on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, as far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally."

See *Australian Consolidated Press Ltd. v. Uren* [1969] 1 A.C. 590 at 633.

In the present case the purchaser has appealed to Her Majesty in Council and the decision of that appeal will be based on the law of Queensland including the 1983 Act. In any event, if this appeal succeeded, the summary judgment of the courts below would be set aside, the purchaser would be given leave to defend the specific performance action and upon the trial of that action the Queensland courts would be bound to apply section 49.

Their Lordships have accordingly humbly advised Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

