Hocana v Jamsapi - [2007] NSWSC 928

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CITATION:	Hocana Pty Ltd v Jamsapi Pty Ltd [2007] NSWSC 928
HEARING DATE(S):	20/08/07
JURISDICTION:	Equity Division
JUDGMENT OF:	Young CJ in Eq
EX TEMPORE JUDGMENT DATE:	20 August 2007
DECISION:	Order that caveat be removed from subject property.
CATCHWORDS:	CONVEYANCING [90]- Vendor and purchaser- Breach of contract- Remedies of vendor- Purported termination by vendor after purchaser fails to complete- Land tax unpaid by vendor when notice to complete issued- Purchaser takes nine months to lodge caveat in response- Contract must be taken to have been abandoned through mutual silence of parties after purported termination- Caveat must be removed.
LEGISLATION CITED:	Real Property Act 1900, s 74MA
CASES CITED:	Halkidis v Bugeia [1974] 1 NSWLR 423 McNally v Waitzer [1981] 1 NSWLR 294 Neeta (Epping) Pty Ltd v Phillips (1974) 131 CLR 286
PARTIES:	Hocana Pty Ltd (P)

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	Jamsapi Pty Ltd (D)
FILE NUMBER (S):	SC 4063/07
COUNSEL:	J T Johnson (P) G A Moore (D)
SOLICITORS:	Sally Nash & Co (P) Richard Barron (D)

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

YOUNG CJ in EQ

Monday 20 August 2007

4063/07 – HOCANA PTY LTD v JAMSAPI PTY LTD

JUDGMENT

1 HIS HONOUR: This is an application under section 74MA of the Real Property Act 1900 to have caveat AD 331216 removed from the title of property known as "Hopewood", 6 Centennial Road, Bowral.

2 The plaintiff as mortgagee entered into a contract to sell that land to Michael and Suzanne Anderson on 13 April 2007 and proposed completion of that contract is imminent. The plaintiff had previously, as mortgagee, entered into a contract to sell the property to the defendant. The latter contract has never been stamped, though I am told stamping is in progress as I speak, but a copy has been marked for identification 3. It is a contract in the 2005 edition of the standard form dated 16 December 2005 with a completion date of 1 March 2006. Completion did not take place on 1 March 2006.

3 The plaintiff issued at least one notice to complete which was not complied with and purported to terminate the contract on 2 November 2006. The plaintiff then put up the property for auction. After that date the property was passed in at auction, however, the oral evidence given on behalf of the defendant makes it clear that the defendant knew that that was happening. The contract with the Andersons was made in April 2007 and the defendant knew, from the material before me at the moment, that the plaintiff was pursuing new purchasers. However, the defendant did nothing until

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10 August 2007 when it lodged a caveat seeking to protect an estate as purchaser pursuant to a contract for sale of land dated 16 December 2006.

4 A significant matter is that the Sheriff was to give possession of the property, which had been occupied by associates of the defendant in more recent times under licence, on 14 August 2007.

5 The defendant filed a cross-claim for a declaration that its contract was still on foot, but it did not seek either damages for breach or specific performance.

6 The cross-claim cannot succeed because the court is obliged to deal with all matters relating to the dispute and cases such as Neeta (Epping) Pty Ltd v Phillips (1974) 131 CLR 286 show that before the court can give relief the applicant must elect as to whether it wants specific performance or damages. Seeking a mere declaration is insufficient.

7 The point being made by Mr Moore, who appeared as counsel for the defendant, is an ingenious one. The authorities say that where a person gives a notice to complete that person must himself be ready, willing and able to complete the contract as at the time of the expiry of the notice to complete. See, for instance, Halkidis v Bugeia [1974] 1 NSWLR 423 and McNally v Waitzer [1981] 1 NSWLR 294 .

8 Here, even though it appears that the plaintiff was unaware of it, the property was subject to land tax and land tax had not been cleared by 2 November 2006. Moreover, as the plaintiff appears not to have been aware of the liability, it would not have been in a position to have cleared it by 2 November 2006, even though it says that had it been aware of land tax it would have just sent a cheque.

9 Assuming that Mr Moore's point is correct, that would merely mean that the contract continued to be in force, notwithstanding the termination on 2 November 2006. However, one has to look at what has happened since then.

10 There is little evidence about this, but what there is suggests that the defendant knew that the property was being re-auctioned. It took no action. It knew that the plaintiff was pursuing other purchasers. It took no action. It is a little unclear as to whether the defendant actually knew of the contract to sell to Anderson before recent times, but the defendant did absolutely nothing until 10 August 2007.

11 It would seem almost inevitable that on a final hearing the contract would have been held to have been abandoned by mutual silence somewhere in the period between December 2006 and 10 August 2007. Accordingly, it was not available to form the basis of a caveat and the caveat AD 331216 must be removed no later than 10am on 24 August 2007.

12 I order that the defendant pay the plaintiff's costs of the proceedings, the cross-claim being dismissed. Those orders may be entered forthwith.

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