

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **PARSOA BAHRAMITASH**

Appellant

AND **SATISH KUMAR AND SUNILA KUMAR**

Respondents

Hearing 3 March 2005

Coram Gault J
Blanchard J

Counsel D G Smith and J C Bassett for appellant
D Singh for respondents.

APPLICATION FOR LEAVE TO APPEAL

10.00 am

Smith May it please the Court, my name is Smith, I appear with Ms Bassett.

Gault J Yes Mr Smith.

Singh Your Honours, my name is Singh and I appear for the Respondent

Gault J Yes Mr Singh. Mr Smith.

Smith Thank you Your Honour. Your Honour I am focusing my attention, as I believe I should, on s.13 of the Act and the criteria there. And I wish to supplement in part the written submissions that you have been given. And the area that I want to focus on this morning is the question that the clause that is the centre of this application, being clause 4 of the Agreement for Sale and Purchase, is one which comes

under a heading of risk and insurance. And in my submission the reason that it is there is because under equitable principles the risk in terms of a property passes to the equitable purchaser at the time that the contract is entered into and subject to whatever is contained in the contract to the contrary. And there has been a development, particularly since the Law Reform, Insurance Law Reform Act of 1985, to try and clarify who has risk and where risk is placed. And the clause that is the subject here is in my submission clearly there because there needs to be clarity as to who will bear the loss, if any, if there is a damage to a property. And of course the classic example is a house burning down between the time of the agreement for sale and purchase being entered into or indeed in matters which you often can't insure for, for flood or pestilence or some sort of that nature.

And so the clause is there to ensure that there is a clear understanding as to who will bear the risk of any damage that may occur between the time of the agreement and the time of settlement. And for that reason I submit that there is an importance in terms of the general public importance in relation to this particular application because it's important that those dealing with land and those who are carrying out the conveyances, whether they be solicitors or conveyancers, know exactly what it is that their purchasing client or vendor client has in terms of risk.

At one stage you used to have a noting of insurance policies and the like to allow for these contingencies. That no longer happens and for that reason, in my submission, the clause that we have in the agreement now makes it clear that the risk passes to the purchaser with certain qualifications.

Now the approach which has been taken by the Court of Appeal in my submission negates that to a certain extent. And there is therefore the importance of the issue that we have it clarified once and for all just who bears what and in what sort of time period are we talking about.

Gault J I hadn't seen how the Judgment of the Court of Appeal negated the certainty.

Smith Well in the sense that in terms of determination as to when that takes place Your Honour. If the Court of Appeal's decision is upheld and it is a matter of choice as to which way the purchaser proceeds in a situation such as this where there is a minor damage for want of a better description to a property, are we going to be in a situation where the determination of the settlement is going to be subject to the purchaser's solicitor taking the attitude that we must have an application for specific performance as opposed to the practical aspect. And this was the aspect which Mr Eades referred to in his letter of having a ready-made procedure.

Gault J I understand the Court of Appeal to say that that wouldn't have applied had the notice given by the vendor been valid. They seem to be of the view that the notice was not valid because the vendor was not ready and willing to settle in terms of the contract when the notice was given. If the vendor had been ready and able to settle when the notice was given, it would have been valid and I don't understand the Court of Appeal to be saying anything other than the cancellation would have been valid, end of story.

Smith Your Honour, as I understand the Court of Appeal decision, they said that the notice was invalid because they held that what was being transferred was what was not contracted for. And that because they said that what was contracted for was a property without lumps of soil on it, therefore the vendor was not in a position to settle and therefore his notice was invalid. And that is the issue in terms of, is that what's contracted for. Because when you have clause 4.2 that actually specifically passes the risk in terms of damage to the property to the purchaser, have they not taken that obligation on? In other words, if there is damage to the property, they are obligated to purchase and then there is the provision that makes a remedy.

Gault J Then the vendor would be equally obligated to accept the contract price less an appropriate abatement.

Smith And that's always been accepted Your Honour.

Gault J Well isn't that really what the Court of Appeal said, that the vendor was not prepared to do that when the notice was issued.

Smith No.

Gault J Which seems to be quite contradictory of a finding of the High Court that the vendor was not shown to have indicated the futility of tender.

Smith That's correct, because tender was never made. And I'm just trying to find the specific clause. The Court of Appeal said at paragraph [40] that the factual situation in this, and there was an invalid cancellation by the vendor who then endeavoured to use 4.2(2) as a shield when sued for specific performance. And it's then when they moved off to saying that they didn't see it as operating as an exclusion to other remedies. But I'm struggling to see where they put it in quite the terms that Your Honour has. Paragraph [28], the starting point is that Mr Bahramitash purported to cancel this agreement on the basis of his settlement notice. But Mr Bahramitash was not at the relevant date and in terms of clause 9.12 in all material respects ready, able and willing to proceed to settlement in accordance with the contract. And then this is a crucial point. Mr Bahramitash was not prepared to give what he contracted to give, namely the subject land without the accretion of the spoilage.

Blanchard J And you're saying that in accordance with the contract, what he could do instead of rectifying the situation before settlement so that the property did comply, he could offer a non-complying property on the basis that clause 4.2 would be used to adjust the price.

Smith Yes and I wouldn't quite slightly put it in that way Your Honour. I'm saying that because of my initial comments, the risk, in terms of that damage, has passed to the vendor. So in fact the, to the purchaser I'm sorry.

Blanchard J That may be true, but there's then provision for an adjustment of the price.

Smith Yes.

Blanchard J Your man had been indicating that he wouldn't accept any adjustment to the price.

Smith It is correct that there was some correspondence that gave some indication of that, but the Ruling by Justice Williams as I understand it was that he wasn't in a position to say that offering and putting settlement with the appropriate deduction would have been futile. What Justice Williams said was that Mr Sutcliffe, who was the solicitor involved, may have indicated that he would have gone and taken instructions had he received that and he may very well have proceeded to settle. And I think I can find that.

Blanchard J Was Justice Williams' conclusion about the futility of settlement one of the matters under challenge in the Court of Appeal ?

Smith In terms of the notice, yes it was.

Blanchard J Yeah, well the Court of Appeal appears to have rather skipped over that point.

Smith Yes.

Blanchard J I guess you're saying, well there's no demonstration by the purchasers of ready, willingness and ability to settle because they didn't tender, tender not being futile as held by Justice Williams, therefore the vendor's not shown to have been in default at the time that the settlement notice was issued.

Smith That is correct.

Blanchard J That's the argument isn't it?

Smith That's the argument Your Honour.

Blanchard J Yes.

Smith And in fact on the Court of Appeal, I think it's recorded in the Court of Appeal decision, there was a discussion with Counsel that appeared before them, Mr Dale, about him conceding that had there been a tender of settlement with an appropriate diminution in value, then Mr Bahramitash would have been obliged under the terms of the contract to have accepted it.

Blanchard J So doesn't this case really in the end come down to whether there was a need for a tender in the circumstances? A point which the Court of Appeal has failed to deal with.

Smith I think in large that is correct.

Blanchard J Yeah. So you want to put your argument up but in fact the nub of it in the end may well be whether Mr Singh has a counter by saying, well the purchasers weren't in default because they didn't have to tender settlement. They can be shown to have been ready, willing and able, therefore the settlement notice was invalid. Therefore the cancellation was invalid.

Smith I'm quite sure that he will run an argument along those lines.

Blanchard J Yeah.

Smith But I think it does go further than that Your Honour in the sense that if the point of view taken by the Court of Appeal was correct, then we are in the situation where clause 4 or 4.2(2) in this particular case, becomes an option rather than a mandatory requirement. And given the wording of that clause.

Blanchard J Well no, this is really about whether your man was entitled to cancel the contract. And Mr Singh will no doubt say, my people were acting in compliance with 4.2. The only missing thing was a tender of settlement if it was needed. But, he will presumably argue, it wasn't needed because it had been indicated that it would be futile. Now that's a question which required the High Court to draw an inference from the facts. It drew one favourably to your clients. The Court of Appeal it seems to me has not grappled with that point.

Smith No. And because of the view that they took and the way in which they proceeded.

Gault J But it's almost contradictory of it nonetheless isn't it?

Smith I accept that Your Honour.

Blanchard J It rather looks as though they didn't approve of Justice Williams' conclusion but that's just surmised from the general tenor of their Judgment.

Smith Yes.

Blanchard J But the point's gone by default.

Smith And it leaves, well it leaves the situation in a quandary where whether this Court is in a position to do something about that and whether that then falls within s.13.

Blanchard J Well if the Court of Appeal has failed to grapple with a crucial point, it would be totally unfair to allow the leave to appeal without allowing the other point to be argued even though it is fact specific.

Smith I would accept that. I don't think I could argue against that.

Gault J On this point, just as a matter of interest, you might be able to help me, I see from Mr Singh's written material that he refers to point 5.3.

Smith Yes.

Gault J A note made by the purchasers' solicitor on the very day set for settlement recording that Mr Sutcliffe said he had instructions to allow no credit for the spoilage. Now, was there cross-examination of Mr Sutcliffe about that?

Smith Your Honour, you will appreciate that I wasn't Counsel in either the High Court or.

Gault J So you can't help me.

Smith No I can help you in a sense that I have searched through the notes of evidence and the documents filed. And I cannot find any reference to that or any cross-examination to that whatsoever. And in fact I don't know the basis or understand how the references in 5.3 or 5.4 are contained in my learned friend's papers on the documents that I have. And I believe I have.

Gault J You can't, are they not in the evidence?

Smith They're not in the evidence Your Honour.

Gault J I see.

Smith And I would be making some obvious submissions about them if they were tried to be brought in at this stage. I don't believe that they assist the Court in the slightest in terms of this matter.

Gault J Well it was interesting to me because Justice Williams based his critical finding it seems on the view that there was no evidence.

Smith That's correct. And I think he was right from what I have seen Sir.

Gault J Right, thank you.

Smith And in fact that was the second point that I was going to make which was in relation to my learned friend's submissions and that was the first of the points that I was going to make in relation to that is that I think it's totally inappropriate to be raising matters which as far as I am able to tell, were not part of the evidence before His Honour Justice Williams. And in that regard, the other comment I would make about my learned friend's submissions is that they don't in any way seem to argue against s.13 being applicable in this particular matter because they don't address that issue at all.

Your Honour I am appreciative of what the time limits are in this matter and if there were other matters I could assist you with at this stage.

Gault J I think we've identified the issues.

Smith Thank you Sir.

Gault J Thank you Mr Smith. We'll just hear from Mr Singh.

Singh Sir, may I just pick up on what Your Honour Justice Gault has said regarding 5.3. I do have the notes of evidence in front of me and Your Honour is quite correct, apart from the Court questioning, did you make any, take any time, the answer is no. There was no re-examination or cross-examination of Mr Sharma who was giving evidence at the time.

Gault J I was interested in whether Mr Sutcliffe was cross-examined on the point.

Singh Oh, sorry Sir.

Gault J Because the Judge seemed to refer to the fact that Mr Sutcliffe said, oh if they had tendered settlement I would have got instructions.

Singh Yes.

Gault J Now you have purported to refer to a statement said to have been made by Mr Sutcliffe on the very day fixed for settlement that he had instructions not to allow any credit. I was just interested as to whether or not he was cross-examined on that.

Singh It's been a while so I can't quite actually recollect. I was just focusing on Mr Sharma. As my friend correctly pointed out, the leave for this to bring appeal falls under s.3(2)(a) and (c) he relies upon which talks really basically about the general public importance

and the general commercial significance. In my submission Sir, the Court of Appeal and the High Court, when looking at 4.2 they are not a divergence. They are just simply saying that, and they have actually given the plain meaning and effect of that particular clause. When I look at the grounds, the specific grounds set down by the applicant, and particularly in (c) Sir, he said that the agreement clearly excludes equitable principles applying where there is damage to the land being sold and purchased under an agreement. I actually disagree with that. And I, in my submission Sir, the High Court also disagrees with that. Because Justice Williams says, if I may just find his Judgment.

Blanchard J Well can I just clarify something Mr Singh? There's no indication in your submission, and I may have missed something, that you're actually opposing leave.

Singh No, no.

Blanchard J What you've done is to indicate that you'd want to support the Court of Appeal Judgment on two grounds which don't appear there.

Singh Yes.

Blanchard J So are you or are you not opposing leave?

Singh Well I'm opposing leave only, in my written submission, only to the extent that I support the Court of Appeal's decision and reasoning.

Blanchard J Well that's not a ground for opposing leave.

Singh Well Sir.

Blanchard J Surely there is a matter of general or public importance here. The case relates to the operation of an important clause or clauses in a standard form of contract.

Singh I accept that Sir.

Blanchard J Right, well in that case we're going to be granting leave aren't we?

Singh Except I would say, the only thing I would say Sir is before you give consideration of granting leave, if at the end of the day, if the case is going to be so hopeless I cannot see what can be achieved.

Blanchard J But I think we've already indicated from the Bench that it's not necessarily hopeless. There's a missing link in the Court of Appeal's Judgment. Which you've anticipated.

Singh Yes.

Blanchard J Quite correctly in your Ground 2.

Singh Yes.

Blanchard J But can we just leave the Court of Appeal Judgment to stand when it might be flawed? Doesn't necessarily mean, I hear you say that the Court of Appeal came to the wrong result.

Singh Yes, that is.

Blanchard J But accepting that, can we leave the Judgment alone if it's got a flaw in it?

Singh Well Sir if I may just, Your Honour was on a tour last year and in one of the papers.

Blanchard J Yes, I said we don't hear hopeless cases.

Singh But not only that Sir.

Blanchard J But is it necessarily hopeless?

Singh Well I think Your Honour also gave indication that if there are other questions of law, of public importance, just as my friend has raised here, then they can be dealt with at another time but not particularly for the second appellate Court to retry. That's what I understood Your Honour to be saying. But you are quite right, in principle I'm not objecting to the leave being granted. But if it is to be granted, then there are two other grounds on which I support the Court of Appeal decision which the Court did not turn its mind to. At the end of the day I think it would be a hopeless case to try. Apart from that, I can't take you any further.

Gault J We've ... this, the second of your proposed grounds for supporting the Judgment, namely the futility of tender and the apparent inconsistency between the view of the Court of Appeal and the finding of the Judge in the High Court without one referring to the other. But coming back to the first of your proposed grounds, the pegs.

Singh Yes Sir.

Gault J Is there a real issue left in that? Apparently it received very little mention in the Court of Appeal according to the Judgment. It seems to have been remedied within a day of the time for settlement. What's left in that as a serious important point?

Singh The only, my major ground for the boundary, the pegs are Sir that you have evidence of Mr Bowmar who says look, all I did was surveyed it, put the peg where it was supposed to go and that was it. But the Rules and the Regulation that actually governs re-pegging

were not complied with and he admits that. Now the moment we reach that particular point it is not possible to say that the property is pegged unless the Court is prepared now to say, well it doesn't really matter if a surveyor does not completely follow all the procedures because.

Blanchard J Physically all the work had been done.

Singh Physically the work was done yes Sir.

Blanchard J Does the contract require more than that?

Singh Well no, no the contract doesn't require more than that Sir but it's, the contract requires the vendor to ensure it is pegged. The word "pegged" must necessarily mean pegged in accordance with the law of this country. Now the surveyor admits he did not submit the report to the Surveyor General. The Surveyor General has rights of requisition once the reports are submitted because he looks at his other cadastral data that he has. These opportunities are not available and that was my basic argument when I did a judgment recall before Justice Williams. And as Justice Blanchard has just pointed out, His Honour's view was, well that's not part, that is a matter between the surveyor and the Surveyor General. But I would have thought that if we are going to get a leave to appeal, it is also fairly important for this Court to make a determination as to whether a surveyor can just leave it at that and that then the vendor can then say, well I have got someone who is standing out there with qualifications saying I'm a surveyor and I have done it and whether it's done or not in accordance to law is irrelevant.

Blanchard J Was this argued in the Court of Appeal?

Singh In the Court of Appeal Sir I attempted to argue it but I think the Judges over there just simply honed in to the.

Blanchard J Well the answer, you're answer is mm?

Singh The answer is no. Except to say, well we can put it aside.

Blanchard J But you did attempt to raise it?

Singh Oh yes. Yes.

Blanchard J Yes.

Singh The Court of Appeal there thought that the idea was misconceived. And I gather they followed that, largely to the pleadings that was in the High Court, it wasn't done correctly and that was pointing out the pegs rather than having it pegged.

Gault J I have to say it's not setting me alight either Mr Singh.

Blanchard J No, what does the clause actually say? We haven't got a copy of it.

Singh The clause is, it's 5.1 Sir, it says that the vendor shall not be bound to point out the boundaries of the property except that on sale of a vacant residential lot which is not limited as to parcels the vendor shall ensure that the property is pegged at the possession date. And Justice Williams correctly pointed out, and I have quoted him in my submission to you Sir, that pegged must be taken as meaning that all boundary markers required by the Act and Regulations were present in their correct position at possession date. My argument.

Blanchard J Well you are not in a position to show that they weren't present in their correct position.

Singh No, Sir, we had the opportunity of cross-examining the surveyor. And he admitted that he did not carry out the survey in terms of the, to it's tenth degree. That's.

Blanchard J Well we just, we simply don't know that the pegs weren't in their correct position. We don't know in other words whether there was a default by the vendor.

Singh But Sir if the.

Blanchard J And it's for you to prove the default.

Singh Well I, the proof of default Sir as I say was in the examination of Mr Bowmar and he admitted he did not provide a report to the Chief Surveyor.

Blanchard J Yes but did he admit that the pegs were in the wrong place.

Singh Oh no, no, no, as far as he's concerned.

Blanchard J Well that's where it ends.

Singh Does it Sir?

Blanchard J Well if you want to challenge whether the pegging was correct, you should have had your own surveyor go and check. It doesn't seem to me there's a lot of merit in this point.

Singh I'll be guided by Your Honour. I have nothing else to add unless there's any further questions Your Honours have.

Gault J No thank you Mr Singh. Have you got anything arising from that Mr Smith?

Smith Thank you.

Gault J We'll just retire for a short time.

10.30 am Court adjourns

10.36 am Court resumes

Gault J Leave to appeal is granted. Pursuant to the Rules it is necessary to indicate the points approved. They are:

First, whether the appellant's cancellation of the contract was valid as the Respondents had failed to comply with the settlement notice validly issued after they failed to settle, the appellant not being in default, and accordingly the respondents were not entitled to an Order for Specific Performance;

Secondly, the respondents may support the Judgment under appeal on the ground not appearing in the Judgment of the Court of Appeal that they were not in default when the settlement notice was issued and the appellant was himself in default because contrary to the finding of the High Court, they were ready, willing and able to settle in accordance with clause 4.2(2) and were not obliged to tender settlement, the appellant having made it clear that it would be futile to do so as he would not accept any tendered amount less than the full purchase price.

Now there arises the question of security for costs. Presumably Counsel would be in agreement that the hearing is unlikely to take more than a day.

Counsel (away from microphone) Yes Sir.

Gault J Yes. Very well, we'll fix security for costs in sum of \$6,000.00. We perhaps should mention that the matter of costs in this Court is being considered generally and the fixing of that sum should not be taken as necessarily and indication of any award of costs that might be made ultimately.

We will issue a Judgment to the effect just outlined.

10.39 am Court adjourns