Masterton Homes Pty Ltd v Executive Builders & Developers Pty Ltd (1) Peter James Roddam & Glenda Joyce Roddam (2) Michael Isakka (3)

JUDGMENT : **Bryson J.** Supreme Court in New South Wales. 10th October 2003.

1 The first defendant Executive Builders & Developers Pty Ltd is a developer which has carried out and almost completed a subdivision development at Meroo Road, Meroo Meadow near Berry New South Wales, called the Maddor Park Residential Estate, containing 72 residential lots. Executive Builders entered into 20 separate but interdependent contracts each for the sale of one lot to the plaintiff Masterton Homes, and each dated 3 October 2002. The conditions of the contracts are uniform except as to lot numbers and prices and Exhibit A relating to Lot 2 represents these contracts.

2 Masterton Homes commenced the proceedings by Summons on 2 September 2002 and claimed specific performance of the contracts, and other remedies directed to ensuring the withdrawal of caveats lodged by two other defendants; the claims relating to the caveats have been resolved and the plaintiff has discontinued against those other defendants. By Special Condition 46 of the contracts Masterton Homes was disentitled from lodging caveats. The plan of subdivision was unregistered when the contracts were entered into; when the evidence concluded on 3 October it was still unregistered. Special Condition 51 related to the subdivision and provided to the effect (sc51(a)) that completion was subject to and conditional upon registration of the plan of subdivision. Subclause 51(b) provided:
In the event that the plan of subdivision has not been registered within 12 months from the date of this contract than either party hereto may rescind this contract by written notice served on the other and clause 19 shall apply.

3 I have accepted for the purpose of this application that the last day of the period available for registration was 3 October 2003.

4 Clause 19 is one of the printed conditions in the 2000 edition of the standard form of contract and states the procedure by which a party with a right to rescind can exercise the right. Where there is a rescission the deposit must be refunded. A party can claim damages arising out of breach of the contract. Printed Clause 29 deals with conditional contracts, and applies because Special Condition 51 makes the contract a conditional contract. Provisions of cl.29 include the following:
29.4 If anything is necessary to make the event happen, each party must do whatever is reasonably necessary to cause the event to happen.
29.5 A party can rescind under this clause only if the party has substantially complied with clause 29.4.

5 The effect is that Executive Builders has a contractual obligation to do whatever is reasonably necessary to cause the plan of subdivision to be registered, and Executive Builders can only rescind the agreement if it has substantially complied.

6 When the Summons was issued there were several sources of concern about whether the strata plan would be registered within 12 months from the date of the contract. Conflicts between Executive Builders and the two defendants who lodged caveats were possible sources of delay, although the caveats themselves would not have prevented registration of the deposited plan; they have now been removed. Masterton Homes repeatedly called on Executive Builders for assurances or undertakings that the contracts would not be rescinded, and Executive Builders refused to give any such assurances, although making no threat that the contracts would be rescinded. On Thursday 2 October, with practically no notice and on a Notice of Motion produced by counsel to be filed in Court on the morning of that day, Masterton Homes applied for an interlocutory injunction which would restrain Executive Builders from rescinding or purporting to rescind the contracts, and also from entering into any conflicting contracts of sale or other arrangements with other possible purchases of the 20 lots. The lateness of the application is an adverse consideration for Masterton Homes' claim for an interlocutory injunction.

7 The evidence on both sides was assembled with great speed and was unsatisfactory in some ways. The issues at the final hearing will be complex. The grounds on which the proceedings are based are not expressed in a pleading or in any other formal document, but from the manner in which the application was conducted I know that Masterton Homes contends that Executive Builders is disentitled from exercising their contractual right of rescission because it failed to do things which were reasonably necessary to cause registration of the strata plan to happen; it failed to conduct the work and business necessary to bring about registration at appropriate times and with appropriate speed. The plaintiff's case is based on failure to comply with contractual conditions. There are several other grounds which are sometimes encountered in litigation in which property is sold off the plan and purported rescissions are attacked; however there was nothing in the presentation of the case to suggest that the plaintiff alleges lack of good faith or deliberate subversion by the defendant of the project of getting the plan registered. On what I have heard it is very unlikely that there could be such a case as the defendant appears to have strong economic motivations to get the plan registered and be able to go to market and sell or complete sales of its 72. The plaintiff has entered into further contracts with home buyers under which it is to construct houses on the 20 lots and sell them on. I see no reason to doubt the earnest intention that both sides to press on as quickly as they are able to do, and the significance of the defendants' opportunity to rescind, which it has not claimed to exercise, is that the market has moved upwards and it could now sell the 20 lots for significantly higher prices than were achieved in October 2002.

8 The obligation to do whatever is reasonably necessary under cl.29.4 relates to things which fall to be done during the period from 3 October 2002 onwards; it does not relate to any failings in the conduct of the business at an earlier time. Recurringly judicial attention has been given to the responsibility of a developer under a clause of

this kind for delays caused by failings of independent contractors, such as professional advisors or building or engineering contractors on whom the developer relied for carrying out material parts of the works. That is significant here because the defendant has referred to its difficulties with its principal contractor, K&J Lynch Pty Ltd the principal of which is Mr Kevin Lynch, which led to the work being interrupted in January 2003 in circumstances which are in conflict between the principals of Executive Builders and Mr Lynch, and thereafter there has been a complaint that there was delay caused by Mr Lynch. In ***Hawes v. Cuzeno Pty Ltd*** (1999) 10 BPR 97821 I took the approach, in relation to a contract which in some ways resembles Printed Clause 29, that the obligation of the vendor to do everything reasonably necessary to have the plan registered extended to all things necessary for that purpose, whether they were things that the vendor could do himself or whether they were things which he had delegated or which had to be delegated to some independent contractor. Other judges of this Division have taken a different view, and my decision in *Hawes v. Cuzeno* was the subject of adverse observations, although not in a clear way disapproved of, in the Court of Appeal in ***Mitchell v. Pattern Holdings Pty Ltd*** [2002] NSWCA 212; 11 BPR 20,241 [2002].

9 Another question upon which some decisions in this Division may appear to have taken different lines is whether any failing of the contractor has actually been the cause of the delay in the registration of the plan; on a literal reading of cl.29.4 it need not be. It is difficult to relate decisions in this area to each other without close attention to the exact terms of the contractual provision in each case; and as ever there are variations; and it is also necessary to attend carefully to the actual ground of decision, which is not always based upon the express terms of the parties' contract, but sometimes related to implied terms, or to overriding contractual or equitable doctrines. The legal principles which should be applied at the hearing are not fully or clearly settled, and it is appropriate to take a broad view when deciding whether the plaintiff has shown that it has a prima facie case which is reasonably arguable and worthy of interlocutory protection.

10 Mr Lynch, a Civil Engineer who is the principal of K&J Lynch Pty Ltd, was engaged by Executive Builders to carry out construction of road and drainage works and sewer reticulation and water reticulation for the development. I will state shortly the effect of Mr Lynch's evidence. His company entered into a contract with Executive Builders on 17 May 2002. When road construction work was proceeding in Meroo Road in December 2002 an officer of Shoalhaven City Council required measures to be taken to locate a high-pressure water main which serviced the town of Berry. The location of the main was not shown on the plans attached to Mr Lynch's contract. Investigation by digging test pits showed that the proposed sewer main was to be located within what was in fact a distance of only 0.5 metres of the existing high-pressure water main. It was also found that the proposed location of the water main was unsuitable in relation to a high-pressure gas line. As a practical matter it was impossible to lay the sewer line in its design location; redesign and further approval by Shoalhaven City Council were essential. Mr Lynch criticises the design work, but as it occurred before October 2002 I do not regard that criticism as relating to a breach of contract. However when the difficulty arose, in December he says on 11 December 2002, it meant that Mr Lynch's company could not proceed to the next stage of the works, installation of the water supply line. Further, there was a practical necessity to redesign the location of the new sewer line, as well as of the water main for the development, and the sewer line works, which were much deeper than the water main works, had to be constructed first. The design problems cascaded on each other.

11 By the end of 2002, while Mr Lynch was engaged in the work, almost all the works internal to the estate were completed, including storm water drainage, internal water and sewer reticulation and road work including kerb and gutter, road pavement and foot paths, with some further road service works to be completed which in fact was completed in February 2003. Mr Lynch's position as stated on affidavit is that he was unable to proceed because of the design problems affecting external works, and this led to exchanges of contentious positions and to termination, which Mr Lynch disputed, of his contract on 15 January 2003. In proceedings under the *Building and Construction Industry Security of Payment Act* 1999 Mr Lynch made a claim and recovered an award for $263,081.63, suggesting that he established in those proceedings that the merits were with him. Mr Lynch has expressed opinions, based on his qualifications and experiences as a civil engineer, criticising the original design of the external works. He also criticised the time taken to obtain required approvals; approval to install the water and sewer mains in Meroo Road was not, he said, obtained until after 26 May 2003, nor was approval for the location and design of bus stopping bays or for work adjacent to the gas main in Meroo Road. Mr Lynch said that the usual time for construction of all sewer and water reticulation in Meroo Road would be approximately four to six weeks after approval from the Shoalhaven City Council. Accordingly his position appears to be that if the road projects had been properly designed his works would have been completed in or about January 2003. That would of course have left altogether ample time for further steps leading to registration to have occurred well before October 2003.

12 The position taken by Mr Lynch may not be altogether applicable as the burden of his criticism starts with his position that there should have been proper design by May 2002. The relevant time span within which the defendant was obliged to do all things reasonably necessary began in October 2002. However it would seem to follow from what Mr Lynch said that if redesign of the siting of works in Meroo Road was necessary, there was quite enough time after October 2002 to do it and complete the works well before the actual completion which occurred in June or July 2003.

13 Mr Atkins, a registered surveyor, gave affidavit evidence on behalf of the plaintiff. After describing in detail the procedure and the approvals necessary for carrying out the relevant work he gave an appraisal based on examination of the progress claims that more than 80 percent of the incomplete works for which K&J Lynch was

terminated in January 2003 had not been approved by Shoalhaven City Council at the time of termination. He also pointed to there not having been a timely application to Integral Energy for approval of electrical reticulation and lighting design, which he says was applied for only on 9 January 2003 whereas it should have been applied for much earlier.

14 Evidence called by the defendant shows that the defendant has a good arguable case in answer to the plaintiff's claim. Much of what Mr Lynch says is disputed, while Mr Johnson, an engineering associate employed by Allan Price & Associates, the land and development consultant engaged by the defendant, gives an account of the cause of events in which the burden of responsibility does not fall on the defendants. He is prepared to defend the grounds on which Mr Lynch's company's contract was rescinded, that the works were not proceeding in a timely manner. He also points to difficulties created by delays in obtaining approval from public authorities, and points to the time taken by Integral Energy to approve the electricity reticulation plan, which he says was sent for approval on 23 January 2003 but not approved until 14 May 2003; and this outcome was affected by Integral Energy altering the requirement that it had earlier indicated about the size of electricity conduits which were to be installed. He appears to dispute Mr Lynch's contention that the difficulties with the location of the sewer main were caused by faulty design and attributes them to Shoalhaven City Council changing its requirements. Mr Faress, the principal of the defendant has given an account of the preparations which he made, before and after acquiring the land, for carrying out the works, and he put forward his belief that APA took all reasonable steps to achieve completion of the works and release of the plan of subdivision by Council; and he is plainly ready to defend his own conduct of the business.

15 Mr Faress produced in evidence a time-line chart which shows the progress of the work. To my reading this bears out that after the termination of Mr Lynch's contract in January 2003 there was relatively little work done on the ground until May. The principal activity during the interval was certification of the design plan by Integral Energy, which was completed by 19 May, time given to redesigning the external water supply which was completed by 24 March and negotiations with Shoalhaven City Council relating to bus bay design plans. Work resumed on the external water supply about 24 May and was completed by 16 June, on the electricity reticulation by 19 May and was completed by 30 June; work on the internal and external sewer works appeared to have been completed by 4 August and work on the bus bays was completed by about 1 September. Some other works relating to water quality ponds were completed by 28 July. Some other aspects of uncompleted work were dealt with, at least for the purpose of obtaining Shoalhaven City Council's acceptance of the subdivision, by giving bonds for completion of works.

16 If the design was inadequate, it was for the defendant to do everything reasonably necessary to overcome the problems of inadequacy and it was under this obligation from 3 October 2002 onwards. Delays caused by the need for design or redesign work in the midst of the project can be seen as an indication of general inadequacy from the beginning. To my mind it is plainly the case that very little happened by way of works on the site from 17 January until May. While it is to my mind clear that the defendant has matters of defence, it is also clear that the plaintiff has a good arguable case that about three or four months were lost and the completion of construction works was delayed for some such period, by reason of a cumulation of shortcomings which should have been dealt with by adequate design, for which there was enough time during the period commencing 3 October 2002, but by contrast there was undue delay in the response to a series of difficulties which emerged about mid-December 2002.

17 A further series of matters of complaint, which in fact took up most of the time during the hearing, relates to events following the time about July when the works or enough of them to obtain issue by Council of the subdivision plan had been completed. The defendant and also the plaintiff were confronted with obstacles coming from two different directions. There were obstacles from Mr and Mrs Roddam, the second defendants in these proceedings. When the events opened they owned land which was entitled to two easements over land in the subdivided area, including (at least) four of the lots to be sold to the plaintiff, and a number of others. Well before October 2002 the Roddams had entered into contractual arrangements relating to the release of their easements, and had stated in a clear way in writing their readiness for the easements to be released. The Roddam's conflict was compromised in a deed of 18 June 2002 and they consented to release the easements by a clear written statement of consent on 25 June 2002. Accordingly the application for subdivision approval, and consideration of that application by Shoalhaven City Council, and also of the draft subdivision plan in a Preliminary Examination by the Land Titles office proceeded on the basis that the easements, although they still existed, were not shown on the subdivision plan; this was done in anticipation of the Roddams carrying out arrangements for the easements to be released before the plan was registered. From May 2003 onwards however conflict broke out between the Roddams and Executive Builders over actual compliance by the Roddams with this obligation; and over other claims. This led to the Roddams lodging a caveat, and there was litigation commencing in September 2003 between Executive Builders and the Roddams. When the litigation was commenced the Roddam's compliance improved.

18 In an attempt to anticipate resolution of this difficulty the defendant initiated a redesign of its subdivision plan in June, and attempted, eventually with success, to obtain approval by the Council of the subdivision plan showing the existing easements, so that the subdivision plan could be registered before the easements were released, although in the expectation that they would be. On the one hand the plaintiff complained that this redesign caused delay, or that it should have been anticipated; and there were many detailed criticisms of the steps taken on the part of the defendant to obtain approval by Shoalhaven City Council and execution by each of the many

persons involved of the linen plan in its amended form. A number of persons including Integral Energy, mortgagees, the Roddams and mortgagees of the Roddams were required to execute the plan before it could be lodged.

19 Council issued a subdivisional certificate on 4 July 2003 and the plan sealed by Council was handed out on or about 14 August 2003. It was not until 15 September that the plan approved by Shoalhaven City Council was submitted to the Roddam's solicitors for execution by them. In the meantime through some misunderstanding the Roddams had signed an earlier version of the plan marked Draft; this was not registrable. It does not appear to me on the evidence that the defendant's representatives brought about the execution of the draft; what matters is whether there was failure to comply with cl.29.4 in the events which led to submission on the plan on 15 September. The earlier time between the release of the plan sealed by Council on 15 August 2003 falls to be explained by the need to obtain execution by others. The whole process was complex; but the requirements of cl.29.4 are stringent, time was becoming pressing and it does appear to me to be well open to the plaintiff to contend that if everything reasonably necessary was being done the plan would have been circulated round the many people whose signatures were required more quickly than it was. A small number of days saved here and there would have led to the plan being lodged and registered late in September. During the hearing before me on 2 and 3 October this process was almost completed but had not been completed; it seemed reasonable to expect that within the next few business days the plan would be lodged for registration, and that thereafter it would take a period in the order of about five business days for it actually to be registered.

20 The defendant was confronted with an unfortunately complex array of difficulties. As well as being confronted with the need to get the Roddams to sign the subdivision plan or otherwise release their easements in the context (from the defendant's point of view) of meritless claims by the Roddams and the need to sue them, the defendant was also contending with Mr Isakka and his caveat, and with intense inquiry and supervision from the plaintiff, extending to indications that the plaintiff believed it had some influence over the Roddams directly and would deal with them (as may well have been right), and further extending to this litigation. Mr Roddam appears to be entitled to considerable claims for commission on sales which cannot be realised until the plan is registered and the sales are completed; hence the plaintiff's assertion that it might have some influence over him. Overall it is very difficult to understand what is motivating Mr Roddam.

21 The difficulties whatever they were between 4 July and the present time were compounded in their importance by the time taken earlier to complete the works. If the works had been completed several months earlier the difficulties presented by the Roddams and Mr Isakka would have had relatively little significance for achieving registration within time.

22 Notwithstanding the attention given to this aspect during the hearing, I regard this as a side of the case on which the defendant is better equipped with matters of explanation and excuse for the passage of time than it is with relation to the progress of the construction works. The defendant was confronted with claims and opposition by the Roddams which (and of course the Roddams are not parties before me, and I have not heard their position) appear, on the defendant's telling to be altogether meritless; and the Roddam's opposition was overcome with a display of considerable energy including pursuing them into court. The defendant also faced a claim, supported by a caveat which, again speaking in the absence of the caveator, appears to have been altogether without merit, from Mr Michael Isakka. While the events since completion of the work in July 2003 and the circumstances in which the plan still has not been registered are relatively less clearly a ground for the plaintiff to claim a breach of Printed Condition 29, almost four months have passed since Council indicated approval of the amended plan in July, and the plaintiff appears to me to have a reasonably arguable case worthy of interlocutory protection on this aspect of its claim also.

23 Nothing I have said should be understood to be a prediction of the outcome of the proceedings or a dismissal or denigration of the defendant's prospects of successfully resisting them, which appear to be substantial.

24 With respect to the balance of convenience in deciding to make or withhold an interlocutory injunction the plaintiff has tendered evidence, which I regard as reliable, showing the plaintiff's ability in a financial sense, and also readiness and willingness to go on with and complete the contracts. The plaintiff's solicitor gave evidence, on what appeared to me to be good grounds, for expecting that the plaintiff could complete and have funds available within the time frame of a few days or perhaps a week, with funds available at the St George Bank. Indeed the plaintiff has been extremely active in its pursuit of completing the contracts and obtaining title to the 20 lots. The plaintiff has entered into further contractual arrangements with sub-purchasers for whom it will build houses; the interests of those persons in the preservation of the plaintiff's opportunity if successful to obtain title also comes under consideration. The defendant however has not given any evidence of its having entered into any conflicting contractual undertakings, and indeed has not asserted any intention to do so, but has pointed out the significant increase in the state of the market and in the prices at which the lots could be sold if freely available in their hands at the present time. When I attempt to see the significance of this element a limiting factor is inability to see the future state of the market, and whether after the resolution of this litigation any enhanced prices will be available; there may be further enhancement and there may be some loss in respect of which a claim under its undertaking as to damages may have to be made against the plaintiff. My disposition is to expect that the best outcome of contracts for sale of land is actual completion, and that litigation over damages claims for breach of contract is a less satisfactory way to achieve justice.

25 Each party can bring into the balance of convenience the prospects of significant financial loss, the defendant relating to the rise in the value of the markets and the plaintiff a more complicated exercise involving its contractual arrangement with further purchase. The balance of financial risk cannot be clearly seen. However it can be seen that the interests of many persons other than these parties will be injured if the plaintiff does not actually obtain title to the 20 lots. In my view the balance of convenience lies in favour of keeping open the court's opportunity to enforce specific performance of the contracts if the plaintiff should ultimately be found entitled to specific performance.

26 For these reasons I will make an interlocutory injunction as claimed.

27 My Orders are:
(1) I make the order in Short Minutes.
(2) This order may be entered forthwith.

V. Gray – Plaintiff instructed by Yandell Wright Stell – Plaintiff
C. O'Donnell - First Defendant instructed by Clark McNamara Lawyers - First Defendant