



Supreme Court
New South Wales

Case Name: Bondi Road Development Pty Ltd v Selected Properties Pty Ltd

Medium Neutral Citation: [2020] NSWSC 845

Hearing Date(s): 1 July 2020

Date of Orders: 1 July 2020

Decision Date: 1 July 2020

Jurisdiction: Equity - Commercial List

Before: Stevenson J

Decision: Plaintiff entitled to order for specific performance.

Catchwords: LAND LAW – real property – joint venture agreement to develop properties owned by parties – where plaintiff commenced proceedings seeking specific performance of the joint venture agreement – those proceedings settled – where plaintiff now seeks specific performance of settlement deed – where settlement agreement agreed to be a contract for sale of land – whether terms were implied into settlement agreement by s52A(2)(b) of Conveyancing Act 1919 (NSW) and Conveyancing (Sale of Land) Regulation 2017 (NSW) concerning land tax certificates – whether purported notice to complete and notice of termination of settlement agreement effective

CONTRACTS – remedies – specific performance – whether plaintiff entitled to specific performance of settlement agreement

Legislation Cited: Conveyancing Act 1919 (NSW)
Conveyancing (Sale of Land) Regulation 2017 (NSW)
Land Tax Management Act 1956 (NSW)

Category: Procedural and other rulings

Parties: Bondi Road Development Pty Ltd (Plaintiff)
Selected Properties Pty Ltd (First Defendant)
Charles Lo-Presti Pty Ltd (Second Defendant)
Michael Peter Lane as Tutor for Charles Lo-Presti
(Third Defendant)

Representation: Counsel:
G Laughton SC with J O'Sullivan (Plaintiff)
R Angyal SC with S Cominos (Defendants)

Solicitors:
& Legal (Plaintiff)
VC Lawyers (Defendants)

File Number(s): 2020/172394

JUDGMENT

- 1 On 26 March 2018 the plaintiff, Bondi Road Development Pty Ltd, entered into a joint venture agreement with the defendants, Selected Properties Pty Ltd and Charles Lo-Presti Pty Ltd (“the Joint Venture Agreement”).
- 2 The joint venture concerned the development of a residential unit building proposed to be built on the land at 7, 9 and 11 Bondi Road in Bondi Junction.
- 3 At the time of the Joint Venture Agreement:
 - (1) A residential unit development the subject of Strata Plan 55017 was erected on 7 Bondi Road;
 - (2) Selected was the registered owner of Units 1, 2, 4, 5 and 7 in that Strata Plan;
 - (3) Lo-Presti was the registered owner of Unit 9;
 - (4) Bondi Road had exchanged contracts to purchase the remaining units at 7 Bondi Road, Units 3, 6 and 8;
 - (5) Bond Road had also exchanged contracts to purchase the adjoining properties at 9 and 11 Bondi Road, on which cottages are presently erected.
- 4 I will refer to the units presently held by Selected and Lo-Presti in SP 55017 as “the Defendants’ Existing Units”.

- 5 The parties have fallen out. The development has not proceeded. The properties at 7, 9 and 11 Bondi Road remain undeveloped.
- 6 On 21 February 2020, Bondi Road commenced proceedings in this list seeking specific performance of the Joint Venture Agreement.
- 7 On 10 March 2020, the parties settled those proceedings on the basis of a document executed on 10 March 2020 (“the Settlement Agreement”).
- 8 On 10 June 2020 Bondi Road commenced these proceedings in which it seeks specific performance of the Settlement Agreement.
- 9 The Settlement Agreement provided, relevantly:
 - “1. Bondi will pay \$4,500,000.00 to Selected and Lo-Presti within 28 days of the date of this agreement ...
 2. On payment being made under cl 1, Selected and Lo-Presti will hand Bondi executed Transfers ... in registrable form, of [the Defendants’ Existing Units]
 - ...
 - 3.1 By this agreement the parties terminate the [Joint Venture Agreement] effective immediately, with the intent that any accrued rights and obligations under the [Joint Venture Agreement] are discharged immediately.
 - 3.2 Mutual releases apart from the promise in this Agreement.
 4. The parties agree that with respect to [the proceedings referred to at [6] and [7] above], within 7 days of settlement of the sales of the properties they will file consent orders providing for the proceedings to be dismissed and all existing orders vacated with no orders as to costs.
 5. Upon settlement of the sale of the properties, Selected [and] Lo-Presti ... warrant that there is no outstanding liability for Land Tax and there is no charge on the Properties for Land Tax.”
- 10 Bondi Road did not pay Selected and Lo-Presti the \$4.5 million referred to in cl 1 of the Settlement Agreement within the 28 day period specified.
- 11 On 27 April 2020, Selected and Lo-Presti served on Bondi Road a document called “Notice to Complete” calling for completion to take place at 4.00pm on 13 May 2020.
- 12 On 21 May 2020, Selected and Lo-Presti served on Bondi Road a document called “Notice of Termination of Settlement Agreement of 10 March 2020” in which they purported to terminate the Settlement Agreement.
- 13 Bondi Road now brings these proceedings claiming:

- (1) a declaration that the purported Notice of Termination is void and of no effect;
- (2) a declaration that it is entitled to have the Settlement Agreement specifically performed;
- (3) an order that Selected and Lo-Presti specifically perform their obligations under the Settlement Agreement; and
- (4) damages.

Decision

14 Bondi Road is entitled to the relief it seeks.

The central issue

15 Although this was in dispute until argument started before me this morning, it is now common ground that the Settlement Agreement was a contract for the sale of land for the purposes of s 52A of the *Conveyancing Act 1919* (NSW) (“the Act”).

16 Bondi Road contends that, accordingly:

- (a) it was “deemed to have included...such terms, conditions and warranties as may be prescribed”¹;
- (b) as the date for completion under the Settlement Agreement was more than 14 days from the date of the Agreement, the terms prescribed were those in cl 3 of Schedule 2 to the *Conveyancing (Sale of Land) Regulation 2017* (NSW);²
- (c) those terms included that:
 - (i) Selected and Lo-Presti as vendors must serve, at least 14 days before completion, a current land tax certificate;³ and
 - (ii) Bondi Road as purchaser did not need to complete earlier than 14 days after service of the certificate;
- (d) as Selected and Lo-Presti did not serve a land tax certificate in accordance with those terms⁴ they were not entitled to terminate the Settlement Agreement, which thus remains on foot.

17 Selected and Lo-Presti contend that, although the Settlement Agreement was a contract for the sale of land, the terms referred to at [16] were not implied into the Settlement Agreement because it was a “contract between co-owners

¹ Section 52A(2)(b) of the Act.

² Regulation 6(1)(a)(ii).

³ Defined in regulation 6(2) to be a certificate under s 47 of the Land Tax Management Act 1956 (NSW).

⁴ This is common ground.

providing for the acquisition by one ... co-owner of ... part of the share or interest of any other co-owner”⁵ and that, by reason of cl 11 of the *Regulations*, s 52A(2) of the Act does not apply.

18 Selected and Lo-Presti accept that they were only “co-owners” with Bondi Road and that the Settlement Agreement could only be a “contract between co-owners” if the effect of the Joint Venture Agreement was that they gave Bondi Road an equitable interest over the Defendants’ Units.

19 The critical question therefore is whether the Joint Venture Agreement, properly construed, gave Bondi Road such an equitable interest.

20 In my opinion, it did not.

The Joint Venture Agreement

21 The critical clauses of the Joint Venture Agreement are cll 4.2 and 5.2.

22 Clause 4.2 provided that:

“Selected will give Bondi Road and its agents, servants, contractors and employees full and free access and control of the SP Units at all times to carry out the development and complete the project and Selected *shall remain the unencumbered legal and beneficial owner of the SP Units* and Selected will not transfer the SP Units or create any interest in the SP Units except with the prior written consent of Bondi Road which may be withheld or denied at the absolute discretion of Bondi Road, until completion of the development and the project.” (Emphasis added.)

23 “SP Units” was defined in the Joint Venture Agreement as “units 1, 2, 4, 5 and 7 7 Bondi Road Bondi Junction”⁶.

24 Clause 5.2 of the Joint Venture Agreement made a corresponding provision in relation to Lo-Presti. It referred to “the CLP Unit”, defined to mean “unit 9, 7 Bondi Road Bondi Junction”⁷.

25 Thus the “SP Units” and the “CLP Unit” are, together, the Defendants Existing Units.

26 These clauses thus stated that the Selected and Lo-Presti remain legally and beneficially the owners of the Defendants’ Existing Units.

⁵ For the purpose of cl 2 of Schedule 4 of the Regulation.

⁶ Clause 1.1.

⁷ Ibid.

- 27 The parties contemplated that, as the building at 7 Bondi Road would be demolished to make way for the proposed development on 7, 9 and 11 Bondi Road, the Defendants' Existing Units would at some point cease to exist.
- 28 This was contemplated by, amongst other clauses, cl 8 which provided that:
- (1) within 60 days after completion of the project, the parties would do all things necessary to transfer to Selected and Lo-Presti the "BRD Units", defined to mean in effect 7 apartments in the developed building⁸; and
 - (2) Selected and Lo-Presti would do all things necessary to transfer their "interest in the remaining units" (which must mean their interest in the units in the developed building other than the BRD Units) to Bondi Road⁹.
- 29 This was also contemplated by cl 4.4 which provided that Selected would do all things required by Bondi Road to "carry out the development and complete the project in accordance with this agreement" and which further provided¹⁰:
- "In this clause 4, the term 'SP Units' shall include Selected's right title and interest in the land that is comprised in the folio identifier to be issued after the registration of the plan of consolidation of 7, 9, and 11 Bondi Road, Bondi Junction".
- 30 There is a corresponding provision in cl 5.4 concerning Lo-Presti and the "CLP Unit". These provisions speak to the position once the plan of consolidation referred to is registered; that is, they speak prospectively.
- 31 The parties thus contemplated that the expressions "SP Units" and "CLP Unit" have an ambulatory meaning.
- 32 At the outset, those expressions had the defined meanings referred to at [23] and [24] above and thus be the Defendants' Existing Units.
- 33 Once the titles of 7, 9 and 11 Bondi Road were consolidated, and by reason of the provisions referred to at [29] and [30], those expressions are taken to include the "right title and interest" of Selected and Lo-Presti in the land comprised in "folio identifier to be issued" following registration of the "plan of consolidation"; presumably the proposed BRD Units.

⁸ Clause 8.1.

⁹ Clause 8.2.1 to 8.2.3.

¹⁰ In cl 4.4(vii).

- 34 However that maybe, for so long as Selected and Lo-Presti owned the Defendants' Existing Units, as they did at the date of the Settlement Agreement, the expressions "SP Units" and "CLP Unit" in the Joint Venture Agreement, and in cll 4.2 and 5.2 in particular, must be a reference to, and to mean, *those* units.
- 35 In that context, cll 4.2 and 4.3 make clear that the parties agreed that Selected and Lo-Presti remained "the unencumbered legal and beneficial owner[s]" of *those* units.
- 36 Selected and Lo-Presti contended that the prohibition in these clauses on their transferring or encumbering their beneficial interest in their property somehow bespoke a conferral of an equitable interest on Bondi Road and "did not derogate from the acquisition [by Bondi Road] of an equitable interest". I do not agree. That prohibition is understandable in the context of the joint venture as a whole. Selected's and Lo-Presti's contribution to the joint venture was their properties: the Existing Defendants' Units. Bondi Road's contribution was its properties and its expertise as a developer. It is not surprising in that context that the parties agreed that Selected and Lo-Presti should not transfer or encumber their contributed properties. Their agreement to that prohibition did not bespeak an intention to give Bondi Road an equitable interest in those properties. The words used by the parties earlier in the clauses contradict any such implication.
- 37 Selected and Lo-Presti also pointed to cl 2.3 of the Joint Venture Agreement that provided:
- "Title to the CLP unit and SP units shall remain in the name of Selected and Lo-Presti respectively and Selected and Lo-Presti *shall hold the units for and on behalf of the joint venture.*" (Emphasis added.)
- 38 Again, the reference here to the CLP Unit and the SP Units must be a reference to the Defendants' Existing Units.
- 39 Selected and Lo-Presti submitted that it can be inferred from the words I have emphasised that the parties intended to create a trust, in favour of Bondi Road, over the Defendants' Existing Units.

- 40 I do not agree. The clause states that Selected and Lo-Presti hold the Defendants' Existing Units for and on behalf of the "joint venture"; not for and on behalf of Bondi Road. Although Selected and Lo-Presti appointed Bondi Road to "manage, supervise and conduct the development activities"¹¹, Bondi Road was not itself the joint venture vehicle.
- 41 In any event, such a construction cannot be reconciled with the clear language used in cll 4.2 and 5.2.
- 42 In my opinion, Bondi Road was correct to submit that the better reading of cl 2.3 is that Selected and Lo-Presti retained legal and equitable interest in their properties subject to Bondi Road's contractual rights in the Joint Venture Agreement; in particular, the extensive rights given by the parties to Bondi Road to manage, supervise and conduct the proposed development.
- 43 That reading of cl 2.3 is consistent with the provisions in cll 4.2 and 5.2 that Selected and Lo-Presti would not dispose of their legal or beneficial interests in their properties inconsistently with their obligations under the Joint Venture Agreement.
- 44 Further, Bondi Road was obliged by cll 3.5.1 and 3.6.1 of the Joint Venture Agreement to pay rent to Selected and Lo-Presti once Bondi Road obtained vacant possession of the "SP Units" and the "CLP Unit", which expressions must again refer to the Defendants' Existing Units. I see that as being inconsistent with Bondi Road having an equitable interest in the same property,
- 45 Contrary to the defendants' submissions, I do not think cl 2.2 of the Joint Venture Agreement takes the matter any further.
- 46 Clause 2.2 provided that:
- "The parties agree with each other so as to bind not only the parties but also their respective successors and assigns that neither the parties nor their respective successors and assigns will or are entitled to apply to a court for an order for partition, statutory sale or a like order relating to the property until completion of the project."
- 47 I see that clause as being neutral in relation to the question at hand. The retention by Selected and Lo-Presti of their beneficial interest in their properties

¹¹ Cl 3.1

is not inconsistent with them agreeing not to seek an order for partition and the like. As Bondi Road pointed out, the object of the Joint Venture was to cause the existing building, in which the units in question are located, to be demolished and a new one erected in its place. The clause is evidently directed to preventing Selected and Lo-Presti from seeking an order for partition during the time that Bondi Road became legal owner of the redeveloped property pending consolidation of the three titles and registration of the strata plan.

48 The Defendants also referred to recital H to the Joint Venture Agreement which stated that the defendants “have agreed to make the SP Units and CLP Unit available for the development in accordance with the terms of this agreement”. Again, “SP Units” and “CLP Unit” here must mean the Defendants’ Existing Units. The recital does no more than state that Selected and Lo-Presti agreed that their units were “available” to be developed. It does not bespeak a conferral of an equitable interest in those units on Bondi Road.

49 For those reasons, my conclusion is that the Joint Venture Agreement did not confer an equitable interest on Bondi Road in respect of the property in question.

50 It follows that Selected and Lo-Presti were not “co-owners” with Bondi Road on the date of the Settlement Agreement.

The result

51 The Settlement Agreement is a contract for the sale of land a term of which is that Selected and Lo-Presti, as vendors, serve on Bondi Road a current land tax certificate 14 days before completion.

52 No such land tax certificate has been served.

53 It follows that Bondi Road is not yet obliged to complete and that the purported Notice of Termination was of no effect.

54 Bondi Road is entitled to have the Settlement Agreement specifically performed.

55 I make the following declarations, orders and directions:

- (1) Declare that the plaintiff is entitled to have the document entitled “Agreement” between the plaintiff and the first defendant, second

defendant and third defendant dated 10 March 2020 (“Settlement Agreement”) specifically performed and carried into effect.

- (2) Order that the first defendant, second defendant and third defendant specifically perform their obligations under the Settlement Agreement.
- (3) Declare that the defendants’ purported “Purchaser Notice of Termination of Settlement Agreement of 10 March 2020” dated 21 May 2020 is void and of no effect.
- (4) Order that in default of the defendants complying with the orders referred to in paragraph 3 above, an order that the Registrar of the Court be empowered to execute all such instruments and do all such things in the name and on behalf of the defendants as may be necessary in order to specifically perform the Settlement Agreement and directions appointing the Registrar to so act.
- (5) Order that the parties have liberty to apply as to the form of these orders, such liberty to be exercised by 4.00pm on 2 July 2020.
- (6) Order that the parties have liberty to apply generally on short notice to the Commercial List Duty Judge.
- (7) Stand the proceedings, together with proceedings 2020/56774, over to the Commercial List on 7 August 2020 for directions.

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