YAMMOUNI v. CONDIDORIO[1]

Town and Country Planning—Land reserved for road purposes—Whether a defect in title—Non-disclosure by vendors—Return of deposit

This action arose out of a contract of sale of a dwelling-house. There were no encumbrances on the title save that the house and land were reserved under the Interim Development Order for Main Road Purposes. In the requisitions on title, the purchaser inquired as to whether the land came under the operation of the Interim Development Order. The vendors directed him to make his own inquiries, stating that they had no personal knowledge of this fact. The purchaser through his solicitors accepted title, but the following day, as a result of his investigations, discovered the restrictions placed on the use of the land. He refused to pay any further instalments of the purchase money, and the vendors then gave notice of their intention to rescind the contract. The purchaser, claiming that he had rightfully rescinded the contract after non-disclosure of a material defect in title by the vendors, brought this action for the return of his deposit.

Monahan J. found for the defendants inasmuch as he held that the operation of the Interim Development Order did not constitute a material defect in title, but in the exercise of the discretion of the court under section 49 (2) of the Property Law Act 1958 he ordered the return of the deposit.

It was urged by counsel for the plaintiff that the operation of the Interim Development Order constituted a material defect in the title of the vendor, this reasoning being based on the decision in *Persson v. Raper*,[2] which adopted and applied the tests laid down in the Court of Appeal in *In Re Forsey & Halleybone's Contract*.[3] However, as Monahan J. pointed out, although the present New South Wales and Victorian legislation was similar to the United Kingdom legislation at that time, the latter had undergone a fundamental change, and such an order had become not merely a potential but an actual restriction on the use of land. Despite this, there had been no later decision, and the general trend of thought was that before a planning scheme is formally adopted or generally in force, it does not constitute a material defect in title.

His Honour then went on to say that he would differ from this view only where the effect of the zoning was a total failure of consideration. But since the purchaser had intended to use the property sold as a dwelling-house, he would not be restricted in his enjoyment of it as such in any way. However, despite the fact that the Interim Development Order does not affect the estate of the purchaser or impose any third-party rights over it, the value of the land is lowered. The uses to which the land can be put are strictly defined in the Act, and no deviation is permitted without the express consent of the responsible authority.

In reference to the alternative claim of the plaintiff, His Honour pointed out that in all cases where the vendor sought specific performance

[1] [1959] V.R. 479. Supreme Court of Victoria; Monahan J.
[2] (1952) 69 W.N. (N.S.W.) 10.
[3] [1927] 2 Ch. 379.

against the purchaser, and it was refused, the facts withheld were within the exclusive knowledge of the vendor or his agent. Here, it was as a result of his own inquiries that the purchaser discovered that the land was subject to the Interim Development Order. The purchaser, therefore, could not rescind, but could the vendor, by failing to seek specific performance, deprive the court of its discretion under section 49 (2)?

In *Zsadony v. Pizer*[4] Dean J. favoured a general and unrestricted interpretation of the sub-section—rejecting counsel's submission that it did not apply where the vendor had validly rescinded the contract and forfeited the deposit. In *Mallett v. Jones*[5] Adam J. considered this point also. There the plaintiff sought the return of his deposit after confirming a contract entered into on the basis of a false representation, knowing it to be so. Adam J. stated that, although couched in the widest possible terms, the discretion was to be exercised on basic legal principles and it applied where at law the purchaser had no right to the deposit, but the vendors would not, in all the circumstances of the case, be entitled to succeed in a suit for specific performance.

However, Monahan J. continued, although the actions of the vendors in this instance would prompt refusal of a suit for specific performance, it did not follow that in every similar case, the plaintiff could rely on section 49 (2). He preferred to follow the line of reasoning in *Zsadony v Pizer*[6] and *Mallett v. Jones*[7] rejecting the narrower trend of thought suggested by *Re Hoobin.*[8] As this point was not fully argued in the latter decision, he quotes Dean J. as stating that he understood O'Bryan J. to hold a view similar to his own.

This decision crystallizes the position of Melbourne land under the purview of the Town and Country Planning Act. While the Interim Development Order is in force, at least, it will not cause any material defect in title of land subject to it, unless it results in a total failure of consideration on the part of the vendor, when the ordinary rules of contract law will apply.

MARY E. HISCOCK

STAR EXPRESS MERCHANDISING COMPANY PTY LTD v. V. G. McGRATH PTY LTD[1]

Hire purchase—Unascertained goods—Purpose known to owner—Nature of implied warranty as to fitness

The complainant, Star Express Merchandising Company Pty Ltd, brought a special complaint against the defendant in a court of petty sessions claiming damages arising out of the hiring of a trailer. The magistrate made an order in favour of the complainant for £126 with £92 14s. 0d. costs. The defendant obtained an order *nisi* to review this decision and this was made returnable before the Full Court.

[4] [1955] V.L.R. 496. [5] Unreported, but see, on appeal [1959] V.R. 122.
[6] [1955] V.L.R. 496. [7] *Supra* n. 5. [8] [1957] V.R. 341.
[1] [1959] Argus L.R. 976. Supreme Court of Victoria; O'Bryan, Dean and Smith JJ.