CONTRACT FOR THE SALE OF LAND: CLAUSE 17 AND DISCLOSURE

BEVERLY MANUFACTURING CO. PTY. LTD. v. *A.N.S. NOMINEES LTD.*

The decision of the High Court in *Beverly Manufacturing Co. Pty. Ltd.* v. *A.N.S. Nominees Ltd.*[1] again illustrates the problem that conveyancers have had in ascertaining the requirements of clause 17 of the 1972 standard form of contract for the sale of land approved by the Law Society of New South Wales and the Real Estate Institute of New South Wales. Clause 17 is as follows:

> 17. Should it be established that at the date of this agreement the property was affected by any one or more of the following:
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> (a) any provision of any planning scheme, whether prepared or prescribed, or any interim development order made under the provisions of the Local Government Act, 1919;
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> (b) any Residential District Proclamation under Section 309 of the Local Government Act, 1919;
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> (c) any proposal for realignment widening siting or alteration of the level of a road or railway by any competent authority;
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> (d) any mains or pipes of any water sewerage or drainage authority passing through the property;
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> (e) any provision of or under the Mines Subsidence Compensation Act, 1961;
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> in any manner other than as disclosed in the Fourth Schedule hereto, then the Purchaser shall be entitled to rescind this agreement but shall not be entitled to make any other objection requisition or claim for compensation in respect of any such matter. Any right of the Purchaser to rescind under this clause shall be exercised by notice in writing given to the Vendor prior to completion. In relation to paragraph (c) hereof, the property shall be deemed to be affected by a proposal if the Purchaser produces a written statement of the authority concerned, the substance of which is other than that the property is not affected by any proposal of the authority.

The purpose of this clause is revealed in the following statement by Stephen, J. from his much quoted judgment in *Sargent* v. *A.S.L.*

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[1] (1978) 52 A.L.J.R. 760. Hereinafter *Beverly*.

Development Ltd.:

> The advent of town planning legislation and the control of land uses which it involves has meant that if sales of land are to be undertaken to the satisfaction of both vendor and purchaser the planning status of the land being sold must be known; attention must be paid to restriction upon the use to which it may be put and to any disadvantages to which it may be otherwise subject because of the announced intentions of local planning and construction authorities. In New South Wales the position has been sought to be met by the inclusion in standard forms of contracts of sale of a clause concerned specifically with this question of the disclosure of such restrictions or burdens.[2]

This examination of clause 17 will be limited to the phrase "other than as disclosed in the fourth schedule". The wording of a similar phrase in its predecessor, clause 16 of the 1965 edition of the standard form of contract for the sale of land, is only slightly different ("otherwise than as disclosed in the fourth schedule") and this has made no difference to the effect of both phrases. Consequently decisions on the old clause 16 will be referred to in discussing the litigation on clause 17. The main issue raised is the question of adequate disclosure of the planning status of the land, so that rescission may be avoided (by either party under the old clause 16; by the purchaser only under clause 17).

1. The Issues posed before the High Court in *Beverly Manufacturing Co. Pty. Ltd.*

The facts of *Beverly* were as follows: The Fourth Schedule of the contract contained a statement that the property was affected as shown in the copy certificate under 342AS of the Local Government Act, 1919 (N.S.W.), annexed thereto. That certificate stated: "The Holroyd Planning Scheme applies to this land and the land is within an area defined by the scheme as General Industrial". The purchaser later obtained a further 342AS and this was expressed differently in that it described the land as zoned "General Industrial 'A1' ". In fact, the correct description of the zone in which the land was situated was Industrial General. A note was added in the second certificate in the following terms:

> Clause 43(10) of the Holroyd Planning Scheme Ordinance states that a building shall not be erected nor shall a building or allotment be used for industrial purposes unless such allotment has an area of not less than 12,000 square feet, average width of less than 80 feet and depth of 150 feet and an area of not less than 12,000 square feet.

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[2] (1974) 48 A.L.J.R. 410. Hereinafter *Sargent's Case*.

The appellant purchaser thereupon sought rescission on three grounds pursuant to clause 17, alleging that there had not been a proper disclosure within the requirements of the clause:

(i) That there was no disclosure of the effect upon the property of clause 43(10) of the Planning Scheme.

(i) That the letter and figure preceding the zoning had not been disclosed, whilst the name of the zone affecting the subject property was described in the certificate annexed to the contract as "General Industrial" instead of Industrial General.

(iii) That certain printed matter appearing on the back of the council's certificate (a summary of the effect of the Holroyd Planning Scheme) was positively misleading.

It may be useful to examine the course of the litigation on this phrase before considering the High Court's resolution of these issues in *Beverly*.

2. Litigation *pre-Beverly*

A. NO 342AS CERTIFICATE ATTACHED — FOURTH SCHEDULE LEFT BLANK

The general principles which may be extracted from the litigation *pre-Beverly* are important because some of the issues and arguments raised in connection with the phrase "other than as disclosed in the Fourth Schedule" were not covered by the decision in *Beverly*. *Wolczyk* v. *Barr*,[3] *Sargent* v. *A.S.L. Developments Limited*,[4] *Wallace* v. *Hermans*[5] and *Turner* v. *Labafox*[6] were similar cases where no 342AS certificate was attached and the Fourth Schedule had been left blank whilst the subject property was affected by town planning schemes. In these circumstances, the Courts appear to have adopted a broad approach to disclosure requirements which is epitomized by the judgment of Jacobs, J.A. in *Wolczyk* v. *Barr*. His Honour considered that the test was that one asked whether the interim development order which affects the land had been disclosed in the Fourth Schedule.[7] This is a generous test, which was confirmed by the High Court in *Beverly* where the majority were of the opinion that the purchaser should be on constructive notice of the provisions of the ordinance in question, provided it was referred to either in the Fourth Schedule or 342AS certificate.

Stephen, J. in *Sargent's Case*, considered the argument that when nothing was stated in the Fourth Schedule and there was no 342AS certificate, that this was tantamount to a blank, and to the making of

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[3] (1970) 92 W.N. (N.S.W.) 518.
[4] *Supra* n. 2.
[5] (1974) 48 A.L.J.R. 420.
[6] (1974) 48 A.L.J.R. 426.
[7] *Supra* n. 3 at 519.

no statement at all, and a "non-statement" would not amount to an effect "otherwise than as stated in the fourth schedule" (phraseology of old clause 16). However, his Honour was of the opinion that a blank in the Fourth Schedule conveyed that the property was unaffected.[8] Wootten, J. followed the analysis of Stephen, J. when the same argument was raised in *Rural Bag and Sack Co. Pty Ltd.* v. *Segrave*.[9] It would seem to lead to an absurdity if it were otherwise because a non-statement would amount to disclosure.

This disposes of an important argument concerning the phrase "other than as disclosed in the Fourth Schedule" (clause 17 which is equivalent to the old clause 16). Thus, the purchaser must be notified in the Fourth Schedule or in a 342AS certificate of any town planning schemes, ordinances or interim development orders which affect the land, and a "non-statement" will not absolve the vendor of this obligation.

The *pre-Beverly* litigation also establishes that a 342AS certificate cannot be relied on by either party unless it is attached to the contract, nor will the fact that it is in existence somewhere preclude rescission.[10] Stephen, J. in *Sargent's Case* dismissed the argument that because the 342AS certificate originates with a disinterested third party, the relevant council, then in cases of omission the missing certificate may be deemed to have been annexed to the contract, where there were no recent changes in zoning.[11]

B. NO 342AS CERTIFICATE ATTACHED PLUS INADEQUATE DISCLOSURE IN FOURTH SCHEDULE

In contrast to the broad approach adopted in the cases discussed above where there was no 342AS certificate and the Fourth Schedule had been left blank, in cases where there has been some attempt at disclosure in the Fourth Schedule the tests have become increasingly severe. *Jonray (Properties) Pty. Ltd.* v. *Taranto*[12] (1970) and *Champtaloup* v. *Thomas*[12] (1975) were similar in that a broad general statement was made in the Fourth Schedule as to the planning status of the land whilst no 342AS certificate was attached. In both cases the subject property was within a Foreshore Scenic Protection Area. Asprey, J.A. in *Jonray's Case* was content to apply the more generous test enunciated by Jacobs, J.A. in *Wolczyk* v. *Barr*,[14] and came to the conclusion that because the Foreshore Scenic Protection Area was not

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[8] *Supra* n. 2 at 411.
[9] [1976] 1 N.S.W.L.R. 438.
[10] *Per* Barwick, C.J. *Petelin* v. *Deger Investments Pty. Ltd.* (1976) 50 A.L.J.R. 417.
[11] *Supra* n. 2 at 411.
[12] (1970) 92 W.N. (N.S.W.) 929. Hereinafter *Jonray's Case.*
[13] [1975] 2 N.S.W.L.R. 38. Hereinafter *Champtaloup.*
[14] *Supra* n. 3.

disclosed, the purchaser had the right to rescind;[15] in other words, specific schemes must be referred to in order to preclude rescission. In *Champtaloup* in 1975, however, Wootten, J. noted that "an exhaustive statement is required of the way in which the land is affected by the relevant schemes or proposals, and any omission brings the clause into operation and gives the purchaser the right to rescind".[16] His Honour gave no indication as to what he considered an exhaustive statement to be, but if taken at face value this would place an onerous task on vendors. This *dictum* was applied by Helsham, J. in the unreported case of *Martin & Smith* v. *Ors.*[17] and the approach was similar to the dissenting judgment of Gibbs, J. in *Beverly.*[18]

The judgment of Helsham, J. in *Stevter Holdings* v. *Katra Constructions*[19] in 1976 reinforced the more stringent approach to disclosure taken by Wootten, J. in *Champtaloup.* This case must be mentioned because the decision affected councils as well as conveyancers, and turned on a situation which frequently arises where Local Government planning schemes are involved. In fact, a residential district proclamation had not been disclosed and Helsham, J. decided that the test as to sufficient disclosure was whether the town planning status or actual state of affairs was revealed by the information in the Fourth Schedule. According to his Honour, a residential district proclamation suspended by the Marrickville Planning Scheme Ordinance was still in force even though it "may not be capable of operating to its full extent".[20] The reason for this was that under the Local Government Act there is power to suspend planning scheme ordinances and if this occurred, the residential district proclamation would thus cease to be suspended, and would function to its full extent. Therefore, the land was affected concurrently by the suspended residential district proclamation and by the Marrickville Planning Scheme Ordinance, and both should be disclosed. Helsham, J. referred to the decision in *Wolczyk* v. *Barr* and the judgment of Stephen, J. in *Sargent's Case* to support his conclusion.[21] Neither of these cases involved a suspended residential district proclamation. With respect, this is an unnecessary and inconvenient extension of these tests, because it means that conveyancers will have to ensure, when applying to councils for a 342AS certificate, that details are given of proclamations under s. 309 of the Local Government Act 1919 (N.S.W.) including all *suspended* proclamations. If councils fail to do so then the purchaser may have a

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[14] *Supra* n. 3.
[15] *Supra* n. 12 at 933.
[15] *Supra* n. 12 at 933.
[16] *Supra* n. 13 at 42.
[17] Unreported, 25th July, 1976, Supreme Court of New South Wales, Equity Division.
[18] *Supra* n. 1 at 762.
[19] [1975] 1 N.S.W.L.R. 459.
[20] *Id.* 463.
[21] *Id.* 464.

right to rescind. Although this judgment may be seen to be in line with that of Gibbs, J. in *Beverly,* the majority in *Beverly* were at pains to alleviate the task imposed on conveyancers by decisions such as this.

These decisions illustrate the fact that conveyancing procedures were becoming increasingly more difficult — the test of Jacobs, J.A. in *Wolczyk* v. *Barr* in 1970 only required an interim order be disclosed in order to satisfy clause 17, whilst Wootten, J.[22] and Helsham, J.[23] and 1975 and 1976 considered that the clause required an exhaustive statement of the manner in which the property was affected by the Fourth Schedule or 342AS certificate. The complexities and confusion associated with conveyancing procedures were mounting, consequently the decision of *Beverly* in 1978 was to be welcomed.

3. Resolution of the issues raised in *Beverly Manufacturing Co. Pty. Ltd.* v. *A.N.S. Nominees Ltd.*

A. IN THE NEW SOUTH WALES COURT OF APPEAL[24]

(i) *The provisions of clause 43(10) should have been disclosed in full.* This was the major issue to be considered, and Reynolds, J. rejected this argument because these provisions were a consequence of the zoning which was in fact disclosed.[25] Hutley, J.A.[26] generally agreed with the comments made by Reynolds, J., then discussed counsel's reliance on the *dictum* of Wootten, J. in *Champtaloup* to the effect that an exhaustive statement was required of the way in which the land was affected by relevant schemes. He explained that Wootten, J. was concerned with a restriction which could truly be described as a description of a planning status of land, and that it was misleading to use his statement as counsel had done. This is contentious, however, as Helsham, J. interpreted this *dictum* quite differently in *Martin* v. *Smith & Ors.*[27] Hutley, J.A. considered that clause 17 only required a complete description of the status of the land which is given in the form of tables which appear in all standard planning schemes.[28] Does this mean that a description of the various uses to which the land may be put is required? His Honour does not specify.

(ii) *Letter and figure preceding the zoning not disclosed.* Reynolds J. held that the purchaser could not rely on the fact that the letter and figure preceding the zoning were not disclosed, as these were not part of the zoning and existed only for the purpose of easy refer-

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[22] *Supra* n. 13.
[23] *Supra* n. 17.
[24] Unreported, 14th November, 1977, Supreme Court of New South Wales, Court of Appeal.
[25] *Id.* 4.
[26] *Id.* 5.
[27] *Supra* n. 17.
[28] *Supra* n. 24 at 5.

ence.[29] The purchaser was unconvinced by the unanimous decision of the Court of Appeal and appealed to the High Court.

B. BEFORE THE HIGH COURT

(i) *No disclosure of the effect of clause 43(10)*

This was the crucial issue posed before the High Court, and Barwick, C.J.[30] clearly rejected the approach adopted by Helsham, J. and Wootten, J. in the cases which have been discussed.

His Honour noted the difference in wording between clause 16 of the 1965 edition of the standard form of contract for the sale of land which referred to property being "affected by any town and country planning scheme . . . otherwise than as disclosed . . .", and clause 17 containing the phrase "affected . . . in any manner other than as disclosed . . ." and rejected a submission from counsel that clause 17 requires a full description of the precise way in which the planning scheme affects the land, and that the mere nomination of the zoning of the land under the planning scheme was inadequate.[31] He considered that clause 17 only required the contents of the Fourth Schedule of the 342AS certificate to alert the purchaser to the planning status of the land. In his view, the vendor is not required (at his own risk) to spell out for the purchaser the significance and consequence of the zoning under the particular scheme, and was quite emphatic that the certificate was not intended to detail the consequence of the zoning. He reinforced these comments by criticizing the note provided by the council in the relevant certificate as both unnecessary and misleading.[32] The council ought to have confined itself in relation to the zoning to a description of the zoning. The comments of Barwick, C.J. give the relevant parties a more precise indication of the degree of disclosure required than the vague tests already discussed.

Gibbs, J. concentrated on the phrases "any provision of" and "in any manner" and held that if these words were given their natural meaning, then it was not enough that the schedule or certificate disclosed that the property was in some way affected by a planning scheme, there must be a disclosure of the manner in which the property is affected by any provision of the scheme.[33] Although Gibbs, J. agreed with Barwick, C.J. that the effect on the land of the provisions of clause 43(10) may be regarded as a consequence of the zoning,[34] his Honour was of the opinion that these provisions affected the land in a manner different from the way it was affected by zoning, therefore a reference to a planning scheme would *not* disclose the manner

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[29] *Id.* 4.
[30] *Supra* n. 1 at 762.
[31] *Ibid.*
[32] *Ibid.*
[33] *Id.* 764.
[34] *Ibid.*

in which clause 43(10) affected the land.[35] A reference only would be to ignore the words "any provision of" and "in any manner". The judgment of Gibbs, J. may be seen as a "literal" interpretation of the clause, however, the consequences which flow from it only serve to hinder conveyancers. Thus, it is submitted that the more expedient manner in which Barwick, C.J., Stephen and Jacobs, JJ. deal with the issue of disclosure is to be preferred.

Stephen, J. disagreed with the interpretation of Gibbs, J. and appeared to think that this analysis of clause 17 would lead to absurdity.[36] He considered that if the vendor was required to do more than disclose such information as would enable the purchaser, by reference to the ordinance, to ascertain for himself the way in which the planning scheme affected the land sold, then there could be no half measures. For instance, there were no less than seven clauses in Part VII of the ordinance, in addition to clause 43(10) which specifically affected the subject land zoned, without counting those other clauses which imposed general restrictions. Stephen, J. stated that even if these were disclosed, this would not complete the vendor's task because in some cases disclosure might only be sufficient if the purchaser was supplied with a copy of the ordinance itself. Consequently, his Honour was unable to interpret clause 17 in a way that would involve the vendor in such an exercise.[37] Stephen, J. again preferred the more practical approach to the problem of disclosure which he adopted in *Sargent's Case* and *Wallace* v. *Hermans*.

Jacobs, J. does not add anything to the judgments of Barwick, C.J. and Stephen, J. insofar as disclosure is concerned, and he agreed with the point that their Honours made in respect of the purchaser being on constructive notice of the provisions of the ordinance, provided it was referred to either in the Fourth Schedule or a 342AS certificate.[38]

Per Jacobs, J.:

> The Scheme was a prescribed scheme. The Scheme map was defined in the Scheme and was available for inspection. The parties were contracting by reference to an identifiable document, the prescribed Planning Scheme, and both must be taken to be aware of the nature and contents of that Planning Scheme.[39]

(ii) *Letter and figure preceding the zoning not disclosed.*

Zoning disclosed as "General Industrial" instead of Industrial General.

Barwick, C.J., Stephen, Gibbs, Jacobs and Aickin JJ. dismissed these submissions. Gibbs, J. considered that the letter and figure "A1"

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[35] *Ibid.*
[36] *Id.* 765.
[37] *Id.* 766.
[38] *Id.* 767.
[39] *Ibid.*

did not form part of the name of that zone,[40] whilst Stephen, J. stated that inversion of the two words forming the title of the zone did not result in any non-disclosure within clause 17.[41]

(iii) *Printed matter on the back of council's certificate was misleading*

The High Court unanimously rejected this ground. Stephen, J.[42] considered that it was summary only and did not purport to be a full statement of the effect of the planning scheme. Gibbs, J.[43] held that a purchaser wishing to know the effect of the zoning should look at the table of zones in the Planning Scheme. This approach does not seem consistent with the more stringent measures of disclosure that his Honour required in connection with clause 43(10).

Conclusion

The decision in *Beverly Manufacturing Co. Pty. Ltd.* v. *A.N.S. Nominees Ltd.* vindicates the test enunciated by Jacobs, J.A. in *Wolczyk* v. *Barr* in 1970, by placing the onus on the purchaser to ascertain the manner in which the property is affected, provided he is put on notice by reference in the Fourth Schedule or 342AS certificate that such a planning scheme or interim development order is in existence and affects the subject land. The decision is a welcome one because its practical effect is to expedite conveyancing procedures and alleviate the uncertainty surrounding the disclosure requirements of clause 17. However it is submitted that reform of clause 17 of the 1972 edition of the contract for the sale of land is urgently required, so that matters which are to be disclosed are specifically defined and not referred to generally. Until then, conveyancers and interested parties cannot be completely certain that they have satisfactorily performed their obligations under the contract in all circumstances.

POSTSCRIPT

At time of writing it is noted that s. 342AS of the Local Government Act, 1919 (N.S.W.), is to be repealed (Miscellaneous Acts (Planning) Repeal and Amendment Bill, 1979) and replaced by s. 149 Environmental Planning and Assessment Bill, 1979. However, this will not affect the substance of this discussion on disclosure, as s. 149 of the proposed legislation is to be of the same general effect as s. 342AS of the Local Government Act, 1919 (N.S.W.).

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[40] *Id.* 763.
[41] *Id.* 765.
[42] *Id.* 767.
[43] *Id.* 764.