
TRANSCRIPT OF PROCEEDINGS

S ECI 2022 01920

SUPREME COURT OF VICTORIA

CIVIL JURISDICTION

PRACTICE COURT

MELBOURNE

MONDAY 30 MAY 2022

BEFORE THE HONOURABLE JUSTICE RICHARDS

IN THE MATTER of an Application:

ORCHARD PROJECTS PTY LTD (ACN 612 473 033) v
THE HUNGERS PTY LTD (ACN 612 473) & ORS

MR S. SHARIFY appeared on behalf of the Plaintiff.

MR J. CATLIN appeared on behalf of the First and Second Defendants.

1 MR SHARIFY: As the court pleases, Sharify for the plaintiff.

2 HER HONOUR: Good morning, Mr Sharify. And for the defendant?

3 MR CATLIN: Yes, my name's Catlin, Your Honour.

4 HER HONOUR: And you're appearing for the first and second
5 defendants I gather.

6 MR CATLIN: If Your Honour pleases, yes.

7 HER HONOUR: All right, good. We've had a letter from the
8 Registrar of Titles to indicate that he will not be
9 participating in the proceeding and will abide the order
10 of the court.

11 All right, so I have read the submissions that were
12 filed by both sides and I've read I think the affidavit
13 of - is it Mr Kapoor and the first affidavit of your
14 instructor, Mr Sharify. I understand there's a second
15 one has just been forwarded which I've not had an
16 opportunity to look at. And then I've also read
17 Mr Huang's affidavit and the affidavit in the other
18 proceeding that it annexures. So I have had a look at
19 the material.

20 Mr Sharify, would you like to commence?

21 MR SHARIFY: Yes, Your Honour. Thank you. Your Honour, the
22 parties in these proceedings entered into a contract of
23 sale, as you know, on 28 July 2021. On that same day,
24 Your Honour, the same parties entered into the services
25 agreement, which I understand has had a chance to read.

26 HER HONOUR: I have, yes.

27 MR SHARIFY: Yes. Your Honour, forgive me for abbreviating
28 what that services agreement stands for. I'm just going
29 to cut to the chase and say the effect of it is that
30 Orchard would kick back \$1,220,000 of the \$4,500,000 of
31 the purchase price back to Hungers. Now, the inference I

1 suppose here is that the purpose of the services
2 agreement is - I don't want to put this too highly but to
3 commit some kind of a fraud on Hungers' lender to assist
4 Hungers to obtain finance in circumstances where it
5 otherwise couldn't. If there's another inference
6 available then I'm happy to hear it, but our position is
7 that that services agreement is an unlawful and an
8 unenforceable agreement.

9 Your Honour, parties are agreed beyond - - -

10 HER HONOUR: But in any event it was an agreement for a fixed
11 term - - -

12 MR SHARIFY: Yes, which is - - -

13 HER HONOUR: - - - of three months which expired on October
14 last year.

15 MR SHARIFY: That's exactly right. It's expired. Now, Your
16 Honour, if I can just sort of fast-forward a little bit,
17 there are a few things that the court needs to be
18 satisfied of, or two things really that the court needs
19 to be satisfied of, before the caveat can be justified.
20 The first is that the contract is on foot, it is not
21 validly terminated. The second is that the Hungers
22 should be ready, willing and able to perform the contract
23 immediately.

24 Now, there is some controversy over whether the
25 recission notice was valid or not; we respectfully submit
26 it was clearly valid, clearly terminated. But on the
27 evidence that has been provided by the Hungers, they are
28 not ready, willing and able to perform the contract. On
29 28 May we received the email from Mr Wu attaching the
30 loan offer, what was described as a loan offer. In
31 reality, Your Honour, that is the offer of a loan that is

1 subject to the payment of a \$4,500 fee, which there is no
2 evidence has been paid, and subject to the lender doing a
3 valuation, which there is no evidence has occurred.

4 The amount of the loan that is the offer that is
5 conditionally approved is for \$3,430,000; the purchase
6 price on the contract is \$4,500,000. The email of Mr Wu
7 makes it clear that they are relying on our client to
8 perform its obligation, for lack of a better word, under
9 the services agreement to make this purchase possible.
10 That is to kick some of the - to put a despite down, kick
11 back some of the money and then they use that refunded
12 deposit amount to purchase a property.

13 Now, our client, as Your Honour has said, there is
14 no obligation to perform under the services agreement
15 because it is at least expired but for other reasons as
16 well. So it is that we say they cannot perform the
17 contract. The auction is listed for 11 June, the
18 supplementary affidavit of my instructor has a
19 screenshot, Your Honour, that shows on the realestate.com
20 website that it is listed for 11 June. I can take Your
21 Honour to that page if necessary and I believe we have
22 provided it to my learned friend's instructors as well.

23 HER HONOUR: All right. So I have Mr - is it Milicevic?

24 MR SHARIFY: Yes, Your Honour.

25 HIS HONOUR: His second affidavit. Just give me a moment to
26 read it. All right, and what's the page - - -

27 MR SHARIFY: It's on the very last page, Your Honour.

28 HER HONOUR: Very last page, all right.

29 MR SHARIFY: And in the bottom-left corner of it, it says
30 'Auction Saturday 11 June at 3 pm'.

31 HER HONOUR: Yes.

1 MR SHARIFY: Now, Your Honour, I'll make just one point with
2 respect to the question of whether the contract was
3 rescinded. We say it was validly rescinded. As I
4 understand my learned friend's submission that - he says
5 that it wasn't rescinded because we were not able to
6 provide an assurance that one of the caveats would be
7 removed. Now in my learned friend's submissions, Your
8 Honour, on the first page it says '15 October caveat on
9 property registered dealing number to Asian Pacific Group
10 Holdings'. Can I just respectfully correct that, Your
11 Honour. That caveat was not lodged on 15 October 2021 or
12 registered then, it was in fact done so in October 2019
13 and if I can refer Your Honour to the affidavit of
14 Mr Huang - I just need to navigate to the correct page, I
15 apologise. If Your Honour types p46 into the navigation
16 bar, the affidavit is not numbered.

17 HER HONOUR: Yes. Yes, okay.

18 MR SHARIFY: Your Honour will see the title search.

19 HER HONOUR: This is the title search that was part of the s32
20 statement for the July - - -

21 MR SHARIFY: Yes, Your Honour.

22 HER HONOUR: - - - 2021 contract, yes.

23 MR SHARIFY: And it clearly shows that that caveat was lodged.
24 Now the basis for - the basis for the defendant saying
25 that we did not provide such an assurance was that an
26 email sent on 15 October by Mr Wu to my client's
27 conveyancers at the time was not responded to. Now that
28 email, Your Honour, was in response to the conveyancer
29 saying that they were going to rescind the contract. We
30 respectfully say that it was an artificial attempt to say
31 - to create a basis in advance to say that we were not

1 entitled to rescind the contract. Those emails are
2 exhibited in Mr Huang's affidavit and I can take Your
3 Honour to the page number if I can be given a moment.

4 HER HONOUR: All right, just before you navigate away from this
5 page, looking at this title search it appears to me that
6 the property was subject to two mortgages at the time of
7 the contract of sale. There was the first mortgage to
8 National Australia Bank and there was a second mortgage
9 to Asian Pacific Group Holdings which was the subject of
10 the caveat.

11 MR SHARIFY: Yes, Your Honour, yes.

12 HER HONOUR: All right.

13 MR SHARIFY: Yes, I don't understand my learned friend's
14 submissions that take issue with respect to the National
15 Australia Bank mortgage. I thought the issue being taken
16 was with respect to the Asian Pacific Group Holdings,
17 which we say they were aware of at all times. Now I will
18 just find that email which I have noted. Your Honour, if
19 Your Honour navigates to p102.

20 HER HONOUR: Page 102. Yes.

21 MR SHARIFY: Now, unfortunately the sent date and time is cut
22 off in the affidavit. I have independently verified that
23 as Friday 15 October but if there is an issue with it we
24 can swear someone in the tender that, but here - - -

25 HER HONOUR: Unfortunately a number of the exhibits or the
26 pages that are exhibited to Mr Huang's affidavit, not all
27 of the text appears. It looks like there are letters
28 missing.

29 MR SHARIFY: Yes, Your Honour, but this isn't a major point I
30 make and we say respectfully that we succeed on the
31 ground that they're clearly not able to perform the

1 contract, but here is an email that I say was sent on
2 15 October, that's from the conveyancer. The last
3 paragraph says, 'We will be rescinding the contract,
4 issuing today a notice of rescission.' Now I will find
5 the email - the email from Mr Wu is at p99, Your Honour.

6 HER HONOUR: Yes.

7 MR SHARIFY: Now, again there's a lot cut off there. I can
8 inform Your Honour that Friday 15 October 2021, that was
9 sent at nine something pm. This is the email referred to
10 that they say we did not respond to. They say, 'Please
11 kindly confirm if caveat mystery 77 on the title could be
12 removed' and apparently we did not respond to this and
13 this is the basis for - this is our fault for not being
14 able to ready, willing, and able to perform the contract.

15 Now, can I say respectfully taken at its highest
16 the defendant's evidence is that they were not able to
17 secure finance at any point up until 26 November. In
18 fact they were not able to do so up until apparently 28
19 May - or 16 May which is where they - which is when they
20 say the Titan loan was approved. Your Honour, the last
21 issue to mention perhaps is the proceedings before the
22 court currently. Now those proceedings were commenced in
23 I believe February this year.

24 HER HONOUR: The originating motion appears to have been filed
25 on 11 March.

26 MR SHARIFY: That's right, in March. Now, Your Honour has seen
27 the supplementary affidavit and the orders sought, no
28 summons was filed with that originating motion. The only
29 thing that was sought really that could have been given
30 by Judicial Registrar Keith, was the authorisation to
31 commence under 5C and by consent we decided not to go

1 down that path because we said the statement of claim was
2 appropriate and my learned friend acquiesced to that and
3 we haven't received a statement of claim, so we don't
4 actually know what remedy they do seek. Of course we can
5 infer some kind of specific performance, but there hasn't
6 been any real step taken to making that play for relief
7 clear in any way.

8 We respectfully say it is another attempt to delay
9 the sale of this property to others and on 11 June there
10 is going to be an auction and if The Hungers wishes to
11 participate, we cannot stop them. This property was
12 developed for profit, Your Honour. There are mortgages
13 on it. Interest is being paid, clearly there is no
14 contract on foot and they are not willing to - they are
15 not ready at all or able to complete under that contract
16 and on that basis, we say the caveat should be removed.

17 HER HONOUR: Indeed you might say that if the caveat's removed
18 and the property is auctioned and it fetches a price in
19 the range quoted and Hungers is the successful bidder,
20 they might be better off buying the property that way
21 than - - -

22 MR SHARIFY: That exactly what I thought, Your Honour.

23 HER HONOUR: - - - seeking to enforce a contract to purchase it
24 for 4.5m in addition to which there would be a sizeable
25 interest bill by now, I would imagine.

26 MR SHARIFY: Yes, Your Honour.

27 HER HONOUR: Yes, my back-of-the-envelope calculations had it
28 up around \$300,000 by now in interest.

29 MR SHARIFY: I didn't have time to do that bit. Just trying to
30 prioritise the major bits, Your Honour.

31 HER HONOUR: Yes. So it is something of a mystery to me at the

1 moment why the first and second defendants are seeking
2 specific performance of the contract but no doubt
3 Mr Catlin can enlighten me. Was there anything else,
4 Mr Sharify?

5 MR SHARIFY: That's all, Your Honour.

6 HER HONOUR: All right, thank you. Mr Catlin, can you
7 enlighten me?

8 MR CATLIN: Yes, I can. Can I point out how charmingly brief
9 the written submissions are and the dispute before you
10 does have pretty narrow parameters. I'll go straight to
11 Your Honour's question before backing up and being a
12 little bit more elaborate. We say the true price in this
13 matter is reflected in the affidavit of Mr Huang of the
14 offer that was made last year of 3.8m. The price isn't
15 4.5. The parties had some arrangement of this 1.2 coming
16 back which means the net price was always something
17 around 3.3 and 3.5 and as can be seen from the vendor's
18 own statement, auction statement, the price range now is
19 three to 3.3. Now, I know conventionally that may be
20 pitched low to attract buyers but certainly the price
21 isn't 4.5. So if you're wondering about the anomaly of
22 us wanting to enforce at 4.5, we don't seek to enforce at
23 4.5.

24 HER HONOUR: How could your clients possibly enforce the
25 contract that they signed in July last year for anything
26 less than 4.5?

27 MR CATLIN: Well, we say on affidavit there had been a
28 renegotiation and offers of 3.8. We now have - I'm
29 instructed to say in open court we're prepared to offer
30 3.5. I know a courtroom isn't an appropriate place for
31 commercial negotiations to be played out.

1 HER HONOUR: No, I'm not an auctioneer, Mr Catlin.

2 MR CATLIN: No, you're not. But I'm just responding to your
3 query. We say the true net price was something in the
4 range of 3.3 and 3.5 and that's currently reflected by a
5 public - two public statements that are exhibited. So,
6 just briefly, I don't cavil with the statement of
7 principles from my friend of Piroshenko v Grojsman about
8 there being a serious question to be tried and balance of
9 convenience. My learned friend's misstated our position
10 as to why the caveat was properly lodged. There was a
11 failure to provide a capital gains tax withholding
12 certificate until nine days after the notice of
13 termination. That's no small matter. Without a capital
14 gains tax withholding certificate, the purchaser is
15 required to withhold 12.5 per cent of the purchase price.

16 So there was no subsequent reissued notice to
17 terminate. So we simply say that the notice to terminate
18 wasn't validly issued because there are two grounds on
19 which the vendor wasn't able to perform. Firstly, wasn't
20 able to provide and refused to provide any information
21 about this Asia Pacific Holdings mortgage when requested
22 and secondly, it hasn't provided that very significant
23 document. But in any event, you come back to the balance
24 of convenience and what to do now. All we can say in
25 that regard is that we lodged the caveat on 2 May. It's
26 apparent from the document at p133 that the - - -

27 HER HONOUR: Which document?

28 MR CATLIN: It's a public - I'll just find it in the navigation
29 pane. So I'll share it with you, Your Honour.

30 HER HONOUR: Well, there's no need to share it.

31 MR CATLIN: No need to share it, all right.

1 HER HONOUR: Are you referring to an affidavit?

2 MR CATLIN: Yes.

3 HER HONOUR: Yes, so whose affidavit? I have four.

4 MR CATLIN: It's Mr Huang's affidavit and it's at - if you type
5 in p133, it's a statement of information, single
6 residential property located in the Melbourne
7 metropolitan area.

8 HER HONOUR: Yes.

9 MR CATLIN: Let me know when you have that, Your Honour.

10 HER HONOUR: Yes, I have it, thank you.

11 MR CATLIN: Yes, so if you scroll down to the bottom you see
12 the date on that is 4 May 2022. So we say what's
13 happened is we've lodged a caveat to protect our
14 interests and it appears that the vendor has then decided
15 let's auction it two days later and we don't cavil with
16 the submission that there now appears to be a public
17 statement online to the effect that an auction is in fact
18 taking place on 11 June. I just conferred with a real
19 estate agent friend and he said yes, it is there. At the
20 time though we did communicate with solicitors for the
21 vendor and say, 'Well, are you having an auction? Can
22 you tell us?' And they refused to provide us with any
23 information.

24 So where does that leave Your Honour? There is an
25 interesting - Your Honour, with respect, hits the nail on
26 the head, which is why can't our prejudice be cured by a
27 successful result at the auction? All I can say in that
28 regard is having, it's a matter of judicial notice,
29 expended some significant amounts on legal expenses to
30 get this contract over the line we'd like to bring the
31 matter to an end and we can do it promptly.

1 The only contingencies, my friend refers to the
2 contingency of evaluation, well, that can be done
3 quickly. And as I've said in open court, the purchasers
4 are prepared to pay 3.5m. The supplementary affidavit
5 that's been put in suggests that the metadata shows that
6 the document isn't legitimate and that it's been created
7 by Mr Wu, or it might have been filled in by him, but we
8 do say it is a legitimate document.

9 So it's a difficult situation. I think the best I
10 can propose is that the matter be adjourned for a few
11 days to allow the parties to properly treat and for the
12 purchaser to tender better documentation to satisfy the
13 vendor that it is real. This finance has been obtained
14 very late and I concede that, so I concede that the
15 vendor to some extent is taken by surprise by this very
16 late availability of the money, but the availability of
17 the money is real. I can't take it any further without
18 venturing into artifice, Your Honour.

19 HER HONOUR: All right, thank you. Do you want to say anything
20 further about whether your client's established a prima
21 facie case that the contract of sale is still on foot?

22 MR CATLIN: Yes. As I've pointed out, the capital gains
23 withholding certificate was not provided until nine days
24 after the notice to terminate and there was no reissue of
25 another notice to terminate, so the vendor was not in a
26 position to perform on two grounds: firstly, not
27 communicating an ability to remove the caveat of Asia
28 Pacific Holdings; and, secondly, failure to provide
29 necessary ATO documentation, which was very important, no
30 small matter, having to withhold 12.5 per cent of the
31 purchase price, Your Honour.

1 HER HONOUR: That was in circumstances where your client had
2 not paid the deposit that it was obliged to pay under the
3 contract in August last year.

4 MR CATLIN: Correct.

5 HER HONOUR: And in circumstances where your client didn't
6 tender the balance of the purchase price less 12 and half
7 per cent.

8 MR CATLIN: Correct.

9 HER HONOUR: Now, the caveat in favour of Asia Pacific Group
10 Holdings, I must say it looks to me to be a pretty
11 standard caveat that a second mortgagee would lodge on a
12 title and one might expect that to be removed on
13 settlement when the second mortgagee receives the money
14 it's owed.

15 MR CATLIN: Well, with respect, isn't that a curiosity that
16 we're left to guess?

17 HER HONOUR: I don't see why there was any need to guess. It
18 says that the interest that's secured is an interest as
19 mortgagee. What more was there to guess?

20 MR CATLIN: Well, an indication that the caveat would be
21 removable in the ordinary way. There was a plain English
22 request for that information and it wasn't provided and
23 here we are some months later still guessing as to the
24 nature of that mortgage, how much is it for.

25 HER HONOUR: You accept, as Mr Sharifi submitted, that the
26 caveat was on the title at the time the contract of sale
27 was citing to buy.

28 MR CATLIN: Yes, that is correct. That was my error in
29 submission, Your Honour.

30 HER HONOUR: All right, thank you. Was there anything further
31 you wanted to say?

1 MR CATLIN: No, Your Honour.

2 HER HONOUR: All right, thank you. Mr Sharify, do you want to
3 reply to any of that?

4 MR SHARIFY: No, Your Honour.

5 HER HONOUR: All right. I think I'm in a position to give you
6 a decision now.

7 (RULING FOLLOWS)

1 HER HONOUR: Are there any other matters?

2 MR SHARIFY: No, Your Honour.

3 MR CATLIN: No, Your Honour.

4 HER HONOUR: All right. So the orders of the court are that
5 the requirements of Rules 5.03(1) and 8.02 of the Supreme
6 Court General Civil Procedure Rules 2015 be dispensed
7 with and the plaintiffs be authorised to commence the
8 proceeding by originating motion in Form 5C. Second
9 order is an under s90(3) of the Transfer of Land Act that
10 the third defendant remove the caveat lodged by the first
11 and second defendants in dealing No. AV581554F on
12 certificate of title volume 08737 folio 906, being the
13 land situated at 45 Orchard Street, Glen Waverley. The
14 third order in an order that the first and second
15 defendants pay the plaintiff's costs of an incidental to
16 this proceeding on the standard basis to be assessed by
17 the Costs Court if not agreed. The only other order that
18 I need to make is a direction under s42E of the Evidence
19 (Miscellaneous Provisions) Act that the hearing that
20 we've just had can be conducted by audiovisual link.

21 Now, is there anything else before I adjourn the
22 court?

23 MR SHARIFY: No, Your Honour, thank you, Your Honour.

24 MR CATLIN: Not from me.

25 HER HONOUR: All right. Mr Catlin, please do tell your client
26 that if it really wants to buy the property, there's an
27 auction on 11 June and it can go and bid and it may end
28 up purchasing the property for considerably less than it
29 initially agreed to.

30 MR CATLIN: If Your Honour pleases.

31 HER HONOUR: Thank you. Adjourn the court please.

