CITATION:	*Tatiana Pivovarova v Satheesh Kumar Madathil Kurunnan and Deepthi Satheesh* [2011] NTMC 046
PARTIES:	TATIANA PIVOVAROVA V SATHEESH KUMAR MADATHIL KURUNNAN AND DEEPTHI SATHEESH
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Local Court
FILE NO(s):	21110241
DELIVERED ON:	20 October 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	8 September 2011
JUDGMENT OF:	RJ Wallace SM

CATCHWORDS:

Contract – Sale and Purchase of Land

Breach of Contract – Finance Clause

REPRESENTATION:

Counsel:

Plaintiff:	In person
Defendant:	G.V. Phelps

Solicitors:

Plaintiff:	-
Defendant:	Ward Keller

Judgment category classification:	C
Judgment ID number:	[2011] NTMC 046
Number of paragraphs:	23

IN THE COURT OF
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21110241

BETWEEN:

TATIANA PIVOVAROVA
Plaintiff

AND:

SATHEESH KUMAR MADATHIL KURUNNAN AND

DEEPTHI SATHEESH
Defendant

REASONS FOR JUDGMENT

(Delivered 20 October 2011)

Mr RJ WALLCE SM:

1. In April 2010 the defendants, Mr Madathil Kurunnan and Ms Satheesh contracted to purchase Unit 2/12 Dashwood Place, Darwin from the plaintiff, Ms Pivovarova. The purchase eventually fell through when the defendants were unable to obtain finance for their proposed purchase. Ms Pivovarova is suing the defendants for damages arising from what she says was their breach of contract. The defendants say that there was no breach or, that, if there was, it was inconsequential and not causative of loss.

THE CONTRACT AND THE FINANCE CLAUSE

2. The contract signed by the parties followed the standard form provided by Ms Pivovarova's real estate agents. Item O of the contract reads:

O. FINANCE:

Lender: AMP

Amount of Loan: $610,000

Date for Approval: Monday 26th April 2010

3. Clause 24, referred to in Item O, reads:

24. **FINANCE**

If Item O has been completed, completion of this Contract is conditional upon the Buyer obtaining finance as set out in Item O, and the following shall apply:

(a) the Buyer must promptly apply to the Lender or Lenders specified in Item O ("the Lender") for the loan or loans in the amount(s) specified in Item O on the Lender's prevailing conditions as to interest rate, term, and rate of repayment;

(b) the Buyer must take all reasonable steps to obtain the loan and must sign all loan and security documents, do all acts, and pay all fees that the Lender may reasonably require. If the Buyer is a corporation, it must procure the execution of any guarantees and indemnities required by the Lender by the Buyer's directors. The inability of the Buy to secure any directors' guarantees required by the Lender shall be construed as a refusal to accept the loan;

(c) the Buyer must give notice to the Seller that:

(i) the Buyer has failed to obtain finance by the date for approval specified in Item O and the Contract is rescinded; or

(ii) this finance clause has either been satisfied, or waived by the Buyer;

(d) the Seller may rescind this Contract by notice in writing to the Buyer if notice is not given to the Seller under clause 24(c) by 5 pm on the date for approval specified in Item O. This is the Seller's only remedy for a failure by the Buyer to give notice under clause 24(c); and

(e) the Seller's right under clause 24(d) is subject to the Buyer's continuing right to rescind this Contract under clause 24(c)(i) or waive the benefit of this clause by giving written notice to the Seller.

4. Undisputed evidence in the case (most of which was by way of uncontested affidavits) left it hard to resist the conclusion that the defendants had been reckless in agreeing to Item O. For one thing, they had no pre-existing approval from AMP for any loan. Mr Madathil Kurunnan's evidence was that they had had no meaningful history with AMP and he was unable to remember exactly how it had come about that he had nominated, or agreed to the nomination of, AMP as the lender. For another, the purchase price of the unit was $610,000, and by 2010 the days of 100% mortgages were long past. Thirdly, and most saliently, the contract was made on Thursday 22 April. The date for approval, Monday 26 April, is frightfully close to Thursday 22 April, but the reality was even worse than the appearance because Monday 26 April was the ANZAC day public holiday in 2010: for practical purposes the defendants had contracted to try to have finance approved within a day.

THE DEFENDANTS' ATTEMPTS TO HAVE FINANCE APPROVED

5. After signing the contract on 22 April the defendants provided a copy of it to a Mr Stephen Fincher, a Licensed Conveyancer working for Trevor Tscherpig Conveyancing Services, Mr Fincher says, in his affidavit of 31 August 2011, (and it is easy to believe him) that he immediately became concerned at the shortness of time for the approval of finance. The defendants referred him to their finance broker, a Mr Simon Jurasek, or Juraszek, working for the Home Ownership Company in Adelaide.

6. Mr Juraszek (two of whose affidavits have been filed, one with the z in his name, the other not) and Mr Fincher spoke, probably on 22 April. Mr Juraszek was of the view that finance would not be approved by any finance provider within the time set by the contract. He was also of the view that the

defendants were more than likely to obtain finance from the CBA (Commonwealth Bank) than from AMP. He had what appeared to me to be sound reasons for this view. The defendants already owned two properties in Adelaide, both mortgaged by CBA. According to Mr Juraszek (affidavit of 16 June 2011, paragraph 5):

> I was aware that the clients would have better chance to obtain a loan as their aggregate lend would give them bargaining power. I also know that the clients had good conduct with their existing loans and that due to this CBA would be more likely to want more business from these clients.

7. Furthermore, CBA was likely to approve the necessary loan more quickly than any other finance provider. This was because the financial proposal was not simply to mortgage the Darwin property for $610,000, but rather to secure part of the borrowed moneys on the defendants' two Adelaide properties. CBA was acquainted with those properties - it already held mortgages over them - and it would be simpler and predictably quicker to readjust the CBA mortgages than to start from scratch with a new lender.

8. Mr Fincher, having been informed of all this by Mr Juraszek, then amended by hand his copy of the contract, changing AMP to CBA, and informed Ms Pivovarova's agent of the change of proposed lender: no immediate objection was raised to it. It seems that Mr Fincher may have believed that the contract had thereby been successfully amended by agreement – a belief perhaps contributed to by his knowing that the change had taken place during the "cooling off" period permitted in the contract. Part of the Defence originally pleaded relied on the efficacy of this amendment, but that pleading was abandoned at the hearing.

9. Meanwhile, Mr Juraszek, using his skills, expertise and experience made application to the CBA for the necessary finance. The application was ultimately turned down. In his affidavit of 16 June 2011, Mr Juraszek gives as his professional opinion that (paragraph 11):

> I believe this assessment would have been the same from any reasonable and responsible lender, at that time. Since they did not have existing business with AMP, it would have been even less likely a loan would be granted to my Clients by AMP.

10. The defendants did not ever apply to AMP to finance the Darwin property, and their unilateral (and ultimately fruitless) choice to apply instead to the CBA is the first breach of the contract alleged by the plaintiff.

THE SECOND ALLEGED BREACH

11. It will be recalled that Item O in the contract spoke of the defendants applying for finance in the sum of $610,000. It appears from the second affidavit of Mr Juraszek (of 31 August 2011) – or, rather, from the annexure thereto – that he, on behalf of the defendants applied to the CBA for loans involving the provision by CBA of a further $644,339. Of that, $493,339 was to be secured by a mortgage on the Darwin property, and $151,000 was to be secured by increasing the amounts on the defendants' two Adelaide properties, already mortgaged to the CBA.

12. Mr Phelps, counsel for the defendants, asserted from the bar table that the extra $33,339 was needed for stamp duty etc on the Darwin purchase, and I can easily accept that. Nevertheless, to seek finance for $643,339, is inconsistent with the contractual term permitting the seeking of finance in the sum of $610,000. This is the second alleged breach.

13. There is nothing in either of the affidavits of Mr Juraszek touching on whether the defendants' applying for the extra $33,339 made a difference to the outcome of their application. I think I can safely draw on judicial knowledge in saying that, other things equal, the larger the loan applied for, the less likely it is to be approved. According to material that Mr Juraszek produced for the application to CBA (which material, after a chapter of accidents, appears annexed to Mr Phelps' affidavit of 5 September 2011) the defendants' two Adelaide properties were valued by them at $970,000, with

about $685,000 owed to the mortgages on them. Adding $610,000 - the price of the Darwin property – to each side of the ledger makes $1,580,000 with $1,295,000 owed. Adding the extra $33 or 34 thousand to the debit side would have about $1,330,000 owed. Judicial knowledge does not go nearly far enough to permit me an opinion whether that difference would materially affect CBA's decision. I think I can say that it seems a large enough difference, in context, that it might well affect the decision. The defendants have not disproved that it did nor that it is unlikely to have made the difference between getting, and not getting the loan they needed to complete the purchase of the Darwin property.

THE BREACHES

14. It is in my view clear that the defendants were in breach, in both alleged ways, of Clause 24. They were bound to apply to AMP for finance and they never did. They were bound to apply for $610,000, and they never did – they applied for more. The first breach may have been inconsequential. The second may not. (And while it is hard to imagine a vendor declining to contract with a purchaser who nominates the CBA rather than AMP as its finance provider, it is hard to imagine a vendor being happy to contract with a purchaser applying for $37,000 more in loans than the price of the property, because any rational vendor would fear that the contract must be aborted because finance is likely to be refused.) On the evidence before me the defendants' breach in relation to the amount of the loan sought was probably the cause of finance being refused, and therefore of the contract's failure, and therefore the cause of any consequential loss suffered by Ms Pivovarova.

DAMAGES

15. Once a property is under contract, other potential buyers' interest tends to diminish. Once a contract has failed, the sale process has to begin afresh. Ms Pivovarova's evidence was that, at the time of the "sale" to the

defendants, the only other offer was of $590,000. Whether, in the absence of the defendants' offer, she would have been tempted by that prospective buyer, who knows. But, having put the property back on the market, she succeeded – to her relief and surprise, judging from her evidence – in selling it for $610,000. That success tends to establish that that price was a fair one, in the market between April and August 2010, and that the defendants' had not contracted for an excessive price. (I do not immediately see how the case would differ it they had, but the point seems worth making.)

16. In the meantime Ms Pivovarova had been put to expenses (to do with the second sale) and incurred losses which would not have occurred if the contract with the defendants had gone through.

17. Clause 20.1 of the Contract provides:

> 20. **BUYERS DEFAULT**
>
> If the Buyer fails to pay any part of the purchase price or otherwise fails to comply with any of the terms of this Contract, or if the Buyer repudiates this Contract, then the Seller, in addition to any other rights or remedies it may have under this Contract or otherwise at law or in equity, may:
>
> (a) affirm this Contract and sue the Buyer for:
>
> (i) damages for breach of this Contract; and/or
>
> (ii) specific performance of this Contract; or
>
> (b) subject to clause 18, and if the notice given pursuant to clause 18.1 states that unless the relevant default is remedied within the time specified in the notice, this Contract will or may be terminated, the Seller may terminate this Contract and forfeit the deposit (except so much as exceeds 10% of the purchase price) and:
>
> (i) sue the Buyer for damages for breach; and/or
>
> (ii) without further notice to the Buyer, resell the property.

18. And Clause 20.2 provides:

> If the property is resold, the Seller may recover from the Buyer as liquidated damages:
>
> (a) any deficiency in price upon the resale
>
> (b) its expenses connected with this Contract, any repossession, any unsuccessful attempt to resell the property, and the resale,
>
> so long as the resale is completed within 12 months of termination of this Contract, and any profit upon a resale will belong to the Seller.

19. Ms Pivovarova's expenses on the resale, evidenced by invoices from her agents Ray White Darwin, amount to $1,720.00 and appear to be made out on the evidence.

20. As for her losses her evidence is that she moved out of the unit (to Brisbane) and that it was empty and untenanted until sold in August. She had to continue with mortgage payments, and the other expenses that go with ownership (Body Corporate fees, and Council rates). Her claims for mortgage interest $10,835.60 (for 102 days), for Body Corporate fees ($861.79) and Council Rates ($345.84) likewise seem proved. And she claims justifiably, the fees charged by DeSilva Hebron, lawyers, for a letter of demand sent, $77.00.

21. In respect of these claims generally Ms Pivovarova refers me to the judgment of Bowden DCJ of the District Court of Western Australia, in the matter of *Kennedy and Kennedy v Dodds and Dodds and others*, case No CTV 249 of 2009, judgment delivered on 23 August 2010. I refer in particular to paragraphs 167 to 175 of that judgment, which I follow, with respect. I allow Ms Pivovarova's claim in each detail.

22. Each of the parties expressed some anxiety about my perception of some matters not strictly necessary to my reasoning. Of the defendants, I should

say that I accept that they genuinely did desire to purchase the Darwin property, and their failure to obtain finance was the reason they did not complete the contract. Ms Pivovarova was inclined to allege deliberate conspiracy and want of good faith in respect of every action of the defendants. I was not persuaded by much of this: most of the matters which raised her hackles were clearly just ordinary muddle and misjudgement on the part of the defendants, and even more, their advisors. The one exception, where Ms Pivovarova's suspicions appear to be not unwarranted, was the lack of candour on the defence side as to the size of the loan sought from CBA.

23. There will be judgment for the plaintiff in the sum of $13,840.23, together with the costs claimed. (Ms Pivovarova has claimed costs of $595.00. Given that the filing fee was $320.00, that there would have been a bailiff's fee, and that she was legally represented for at least a short time in the early stages of the matter, $595.00 is clearly a small figure.) And the Defendants should pay interest on the judgment sum plus costs at the Supreme Court's prescribed rate (I think it remains at 10.5%) from the date of filing, 25 March 2011.

Dated this 20th day of October 2011

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RJ Wallace SM

STIPENDIARY MAGISTRATE