Supreme Court

New South Wales

Case Name:	Sydney Constructions & Developments Pty Ltd v Cumberland Council
Medium Neutral Citation:	[2018] NSWSC 304
Hearing Date(s):	8 March 2018
Date of Orders:	8 March 2018
Decision Date:	8 March 2018
Jurisdiction:	Equity
Before:	Darke J
Decision:	Proceedings dismissed pursuant to s 61(3)(a) of the Civil Procedure Act 2005 (NSW)
Catchwords:	CIVIL PROCEDURE – summary dismissal – claim for specific performance of contract for sale of land – orders made for plaintiff to provide verified discovery – repeated failures on part of plaintiff to comply with orders – defendant's ability to fairly defend proceedings prejudiced – whether appropriate for proceedings to be dismissed pursuant to s 61(3)(a) of Civil Procedure Act 2005 (NSW)
Legislation Cited:	Civil Procedure Act 2005 (NSW), ss 56, 57, 58, 61, 91
Cases Cited:	Hans Pet Constructions Pty Ltd v Cassar [2009] NSWCA 230 Palavi v Radio 2UE Sydney Pty Ltd [2011] NSWCA 264
Category:	Procedural and other rulings
Parties:	Sydney Constructions & Developments Pty Ltd (Plaintiff) Cumberland Council (Defendant)
Representation:	Counsel: Mr M K Condon SC (Plaintiff)

Mr J Lazarus (Defendant)

Solicitors:
Allsop Glover Lawyers (Plaintiff)
Storey & Gough (Defendant)

File Number(s): 2016/297667

Publication Restriction: None

JUDGMENT – EX TEMPORE

1 These proceedings, which concern a contract for the sale of certain land in Lidcombe, were listed on 21 February 2018 to hear an application by the defendant that the proceedings be dismissed by reason of the plaintiff's numerous failures to provide discovery in accordance with orders made by the Court. The defendant invoked s 61(3)(a) of the *Civil Procedure Act 2005* (NSW) and *Uniform Civil Proceedings Rules 2005* (NSW) r 12.7(1) as powers able to be exercised by the Court to dismiss the plaintiff's claim. The proceedings are listed for hearing to commence on 26 March 2018 for an estimated seven days. That is a little more than two weeks' away.

2 The essential basis of the application was that the plaintiff's failure to provide verified discovery as required placed the defendant in a position where it was seriously prejudiced in its ability to fairly defend the proceedings.

3 The defendant's submissions to that effect had considerable force, but it emerged in the course of argument that if, despite all previous failures on the part of the plaintiff, discovery was able to be provided in accordance with the Court's orders by 6 March 2018, the defendant could prepare and proceed to hearing on 26 March 2018 without suffering an inordinate degree of prejudice.

4 In those circumstances (more fully recorded in the transcript of proceedings on 21 February 2018), the Court decided that it would not be prepared to dismiss the proceedings and that the plaintiff should have a further opportunity to comply with the orders for discovery, this time by 6 March 2018. The proceedings were thus adjourned to today.

5 The position today is that discovery has still not been provided. It was submitted that discovery may be able to be given by tomorrow afternoon,

although in light of earlier predictions about discovery that were not fulfilled, it is difficult to have much confidence in this one. In any event, the discovery that is now foreshadowed would be different in scope to that which has hitherto been contemplated. It is now suggested, in an affidavit sworn by the plaintiff's solicitor this morning, that "the contents of the computer system maintained by Mr Mehajer's companies" are not discoverable. Mr Mehajer is a former director of the plaintiff. I take the reference to "Mr Mehajer's companies" to include the plaintiff. The plaintiff's solicitor had earlier referred (in his affidavit sworn on 20 February 2018) to "the computer system operated by the group of companies of which Mr Mehajer is the principal shareholder". It is apparent from that affidavit that the solicitor was proceeding on the basis that there may be documents on that system that were discoverable. The inability to search the system was cited as one of the reasons why verified discovery could not be completed. It is now submitted that documents on that system are not discoverable because they are not in the possession, custody, control or power of the plaintiff.

6 It is claimed that it is Mr Mehajer's computer system, although Mr Mehajer gives no direct evidence to that effect. There are only references in the solicitor's affidavit to Mr Mehajer referring to the computer as "my computer". Against that rather flimsy evidence, it appears from an affidavit affirmed by Mr Mehajer on 12 May 2017, in relation to an earlier issue of discovery, that he carried out a search of the e-mails on the server that stores the e-mails of the plaintiff. That tends to suggest that the computer system is in the possession, custody, control or power of the plaintiff, but it is not necessary to form a concluded view about that. For the present, it is sufficient to note that the plaintiff now says that documents on the system are not discoverable but rather would need to be the subject of orders for inspection.

7 The defaults of the plaintiff in relation to the giving of discovery are egregious. The first order for discovery was made on 11 August 2017, the day the hearing date of 26 March 2018 was set. An order was made for the parties to give verified discovery by 27 October 2017, although it should be pointed out that categories of documents were yet to be exchanged, and it was envisaged that any disputes about the categories could be dealt with on 6 October 2017.

8 The question of categories of documents was resolved between the parties and on 6 October 2017 an order was made for the plaintiff to give verified discovery by 10 November 2017. That order was not complied with. On 14 December 2017 an order was made that the plaintiff give verified discovery by 22 December 2017. That order was not complied with either. I interpose that on 8 January 2017 the defendant's solicitor foreshadowed that if discovery was not given in about a week, an order would be sought that the proceedings be dismissed with indemnity costs.

9 The matter was relisted on 2 February 2018 on the application of the defendant. An order was made on that day for the plaintiff to give verified discovery by 14 February 2018. That order was not complied with.

10 On 16 February 2018 the plaintiff was ordered to file and serve an affidavit explaining the position about discovery and the reasons for non-compliance with the Court's orders. Such an affidavit was filed and served, and as I have mentioned, on 21 February 2018 the Court made an order that the plaintiff give verified discovery by 6 March 2018. Again the order was not complied with.

11 Various explanations have been advanced by the plaintiff for these defaults. These explanations include difficulties arising due to the seizure by the police of computers, and the incarceration of Mr Mehajer on 24 January 2018. I understand that Mr Mehajer remains in custody.

12 The adequacy of the plaintiff's efforts and the adequacy of the explanations put forward by the plaintiff have been heavily criticised by the defendant. The defendant described the plaintiff in submissions as a "recalcitrant litigant". However, the reasons for the failures to comply are not in my view of central importance compared to the effect of those failures upon the defendant, in particular upon its capacity to prepare for a hearing and have a fair opportunity to conduct its defence. In order to assess the effect that the plaintiff's defaults are likely to have upon the defendant's defence, it is necessary to say something about the nature of the proceedings and the issues raised therein, as well as the categories of documents which are the subject of the orders for discovery.

13 The plaintiff commenced the proceedings by Summons on 6 October 2016. The dispute concerns a contract for the sale of a car park in John Street, Lidcombe. The contract was entered into on 30 July 2013 between the plaintiff as purchaser and the Auburn City Council as vendor. The successor body of the Auburn City Council is the Cumberland Council which has been named as the defendant. The plaintiff seeks specific performance of the contract. In short, the plaintiff contends that the contract remains on foot and that the vendor has not validly rescinded the contract pursuant to Special Condition 14 I. That Special Condition provided that if the plaintiff did not obtain a development consent for the property within 18 months of lodgement of a development application on terms acceptable to the plaintiff, then either party had the right to rescind the contract.

14 It appears that the plaintiff lodged a development application on 30 January 2014. No development consent was obtained within the 18 month period that ended on 30 July 2015. The Council gave notice of rescission of the contract on 19 November 2015. I should also note that the Council subsequently issued notices of rescission in case the first notice was not valid.

15 The plaintiff raises various arguments in support of its contention that the contract has not been validly rescinded. The plaintiff alleges that after the Council informed it in May 2014 that the development application would be deferred until amended plans were submitted, the plaintiff sent certain concept plans to the Council on 10 October 2014. The plaintiff further alleges that the Council informed the plaintiff that it would review the concept plans and then communicate the results of the review to the plaintiff. The plaintiff says that the Council led the plaintiff to believe that it was not concerned that development approval might not be obtained within the 18 month period, and that the plaintiff would be given the opportunity to lodge a development application which took into account any comments or recommendations the Council made concerning the concept plans. The plaintiff contends that, acting in reliance upon the Council's conduct, it did not lodge any development application in early 2015 and did not press the Council to consider the concept plans expeditiously.

16 The plaintiff alleges that the Council failed to act in good faith in various respects, including by failing to inform the plaintiff that it might seek to rescind the contract once the 18-month period expired, by failing to do what was reasonably necessary to on its part to cause the development application to be processed, and by then proceeding to rescind the contract.

17 The plaintiff contends that the Council's conduct was in breach of the contract and also gave rise to an estoppel precluding the Council from rescinding the contract pursuant to special condition 14 I (at least until the plaintiff's amended development application had been considered). The plaintiff contends in the alternative that if the Council had a right to rescind, it waived that right or lost it through its conduct, including conduct in the period after 30 July 2015.

18 It is clear that numerous alleged conversations between representatives of the plaintiff and representatives of the Council are of central importance to the arguments raised by the plaintiff (see in particular paragraphs 14 and 14A of the Further Amended Statement of Claim). The alleged conversations are denied by the Council. So, too, is the receipt of any concept plans on 10 October 2014.

19 The plaintiff was ordered to provide discovery of documents falling within nine categories. It is clear, in my view, that most of those categories (in particular categories 2, 3, 4, 5 and 7), go to matters that are critical to the determination of the issues in the proceedings. For example, the third category seeks documents relating to the alleged acknowledgements provided to the plaintiff of the receipt of the concept plans, the fact that the Council would review the plans, and the Council's intention to communicate the results of the review to the plaintiff. Another example is the fourth category, which calls for documents relating to conversations between the plaintiff and the defendant in which the plaintiff alleges that the defendant indicated that it was not concerned with the 18-month deadline contained in Special Condition 14 I.

20 As submitted by the defendant, in a case that will turn on disputed conversations, full disclosure of any relevant documents is essential, and the failure of the plaintiff to give that disclosure significantly prejudices the

defendant's right to a fair trial, particularly in circumstances where the defendant has itself given full disclosure to the plaintiff.

21 The defendant seeks the dismissal of the proceedings pursuant to either s 61(3)(a) of the *Civil Procedure Act* ("the Act") or *Uniform Civil Procedure Rules* r 12.7(1). The power to dismiss under s 61(3) of the Act is enlivened in the sense that the pre-condition for its exercise is satisfied, namely, a failure to comply with a direction of the Court. Section 61(3)(a) is found in Division 2 of Part 6 of the Act. Section 58(1) of the Act provides that in deciding whether to make any order or direction for the management of proceedings, including any direction under Division 2, the Court must seek to act in accordance with the dictates of justice.

22 It is inherent in the reasoning of the Court of Appeal in *Hans Pet Constructions Pty Limited v Cassar* [2009] NSWCA 230 at [36]-[37] that an order made under s 61(3) is a direction under Division 2 for the purposes of s 58(1). Accordingly, in deciding whether to make such an order, the Court is required to seek to act in accordance with the dictates of justice.

23 Section 58(2) then provides that for the purpose of determining what are the dictates of justice in a particular case the Court must have regard to the provisions of ss 56 and 57 of the Act.

24 Section 56 provides that the Court must seek to give effect to the overriding purpose of the Act and rules of court, namely, the just, quick and cheap resolution of the real issues in the proceedings. Section 57 provides that for the purpose of furthering that overriding purpose, proceedings are to be managed having regard to various objects, including the just determination of the proceedings. That is matter of cardinal significance in the present application.

25 The defendant submitted in relation to ss 56 and 57 of the Act that there is no doubt that the plaintiff's repeated breaches of the Court's orders in respect of discovery does not give effect to the just, quick and cheap resolution of the real issues in the proceedings. Indeed, it was submitted that the plaintiff's conduct is the antithesis of the norms of conduct mandated by ss 56 and 57.

26 The defendant noted that the plaintiff's conduct was more serious because it has the benefit of caveats over the land which restrain the defendant from dealing with it. It is submitted that in those circumstances a defendant has a legitimate expectation that the proceedings will be conducted with expedition. The defendants also point to some evidence which indicates that there is the a least some doubt over the plaintiff's ability to satisfy an undertaking as to damages.

27 The defendant submitted that the plaintiff's failure to give discovery went to the heart of the defendant's ability to conduct a fair defence, and as I have mentioned, the defendant also criticised the explanations given by the plaintiff for its failures to comply with the Court's orders.

28 The defendant also submitted that merely adjourning the proceedings would cause prejudice to the defendant given that the defendant wants to resolve the uncertainty concerning the land, and that an adjournment, especially one for an unspecified period, would merely prolong that uncertainty.

29 The plaintiff submitted that if the proceedings were dismissed the plaintiff would be irreparably prejudiced as the defendant would be entitled to act on the basis that the contract was at an end and the plaintiff would not retain the benefit of a caveat over the land. Further, the plaintiff would suffer the burden of a costs order.

30 The plaintiff submitted that the prejudice to the deficient is significantly less as there will (at some point) be a hearing of the plaintiff's claim and in the meantime the car park will continue to be operated by the defendant. It was also suggested that any further prejudice to the defendant could be cured by orders preventing the plaintiff, without the leave of the Court, from tendering any documents other than those already produced for inspection or annexed or exhibited to an affidavit already served.

31 I do not accept that suggested means of alleviating prejudice to the defendant. In my opinion, the nature of the case is such that full discovery is necessary in a timely manner in order for the defendant to be afforded a fair opportunity to prepare for hearing and conduct its defence at the hearing. As I have said, most of the discovery categories go to matters that are critical to the

determination of the issues in the proceedings. The suggested regime is inadequate and is itself likely to give rise to disputes that would have the potential to disrupt the orderly hearing of the matter.

32 In further oral submissions made today, the plaintiff emphasised the serious, even draconian, nature of an order for dismissal. It was submitted that this was not a case of contumelious disregard for the orders of the Court, and could be contrasted with cases (such as *Palavi v Radio 2UE Sydney Pty Limited* [2011] NSWCA 264) that involved the deliberate destruction of relevant documents.

33 I do accept that dismissal of the plaintiff's claim is a somewhat drastic measure. The power to dismiss is one to be exercised sparingly and with particular care. I further accept that an order for dismissal would likely jeopardize the plaintiff's prospects of ever becoming the owner of the land.

34 A dismissal under s 91 of the Act does not (subject to any particular terms imposed) prevent a plaintiff from bringing fresh proceedings or claiming the same relief in fresh proceedings. It seems to me that in the present case any dismissal would appropriately be subject to a term that the plaintiff pay the defendant's costs of the proceedings before being able to commence fresh proceedings. Further, the defendant ought not in the meantime be hindered in its dealings with the land. Accordingly, in practical terms, the plaintiff's claim for specific performance (although not any claim it may have for damages) could well be lost, although the defendant apparently has no current plans to sell the land, and any such sale would, the Court was informed, be conducted by way of a public tender.

35 It should be noted in this context that a decree of specific performance is a discretionary remedy, and it is incumbent upon a plaintiff seeking that remedy (and especially one with who is maintaining caveats) to proceed with all due dispatch, including by complying with the orders of the Court in a timely fashion. That has clearly not occurred in the present case.

36 Even though the hearing date was set in August last year and the plaintiff was ordered in October 2017 to provide discovery of documents within the nine categories, the plaintiff has repeatedly failed to do so. The plaintiff has brought

about a situation where the hearing cannot proceed without causing undue prejudice to the defendant.

37 The plaintiff does not seek an adjournment. It is evident from some of the correspondence between the solicitors that the plaintiff has contemplated making such an application, but it has not done so. Even today, in the course of discussion between the Bench and Senior Counsel for the plaintiff, it was not suggested that an adjournment or vacation of the hearing date would be an appropriate alternative to an order for dismissal. Rather, it was suggested that the plaintiff have yet more time (another week) to provide discovery, presumably discovery not extending to any documents on the computer system. I do not consider that suggestion as appropriate. As pointed out by counsel for the defendant, the court books are due to be delivered on Monday. It appears that the plaintiff would be content to proceed to hearing as matters currently stand. That is not acceptable in my view.

38 I have nonetheless considered whether the hearing dates should simply be vacated rather than dismissing the proceedings. However, in the absence of evidence that satisfies the Court that the plaintiff will be able to get its house in order in the very near future, that is not a desirable course. It would only prolong the uncertainty surrounding the land, and could be seen as rewarding a litigant that is, and has been for months, in default of the Court's orders. Whether it is accurate to describe the plaintiff as a recalcitrant litigant, or not, it is clear the plaintiff has failed to fulfil its duty under s 56(3) of the Act. In that regard I should add that had the plaintiff complied with its discovery obligations in a timely manner, any issues about access to the computer system, if the plaintiff considered that it was not in its possession, custody, control or power, could have been resolved well before the date fixed for hearing.

39 The plaintiff has been given a more than adequate opportunity to have its claim for specific performance heard and determined. Its defaults, for which it alone must be considered responsible, have placed the defendant in a position where it would be seriously prejudiced if it were required to now proceed to the hearing fixed for 26 March 2018.

40 Having considered the dictates of justice and the provisions of ss 56 and 57 of the Act, I have come to the conclusion that it is appropriate in the circumstances of this case to dismiss the proceedings pursuant s 61(3)(a) of the Act. As I have said, such a dismissal does not, subject to any terms imposed, preclude the bringing of fresh proceedings. In my opinion, terms should be imposed that no such proceedings be brought (and no caveats lodged on the title to the land) until the plaintiff pays the defendant's costs of the proceedings. Once that has occurred, and subject to the plaintiff then being in a position to properly prosecute its case, it would then be open to the plaintiff to bring fresh proceedings.

41 I do not accede to the defendant's submission that the costs of the plaintiff's claim should be paid on an indemnity basis. Notwithstanding the serious defaults on the part of the plaintiff, given that there has been no determination on the merits, and it was not suggested that the plaintiff's case was an abuse of process or bound to fail, I think the costs of the plaintiff's claim should be paid on the ordinary basis.

42 Subject to one other matter, which I will raise with counsel, I consider that the form of orders sought by the defendant (as contained in the Short Minutes of Order attached to the defendant's written submissions) are appropriate.

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