



## Précis Paper

### Bondi Road Development Pty Ltd v Selected Properties Pty Ltd [2020] NSWSC 845 – Real Property

A discussion about the case of *Bondi Road Development Pty Ltd v Selected Properties Pty Ltd* [2020] NSWSC 845.

#### **Discussion Includes**

- Key facts
- First proceeding
- Second proceeding

## Bondi Road Development Pty Ltd v Selected Properties Pty Ltd [2020] NSWSC 845 – Real Property

In this edition of BenchTV, Julian O'Sullivan (Barrister, 13 Wentworth Chambers, Sydney) and Nicholas Simone (Barrister, 13 Wentworth Chambers, Sydney) discuss the case of *Bondi Road Development Pty Ltd v Selected Properties Pty Ltd* [2020] NSWSC 845.

### Key facts

1. This Supreme Court case examines the construction of a settlement agreement, and in particular, whether it was a contract for the sale of land within the meaning of the *Conveyancing Act 1919* (NSW).
2. Bondi Road Development Pty Ltd (Bondi Road) was a property development company that entered into a joint venture agreement with the defendants, Selected Properties Pty Ltd (Selected) and Charles Lo-Presti Pty Ltd (Lo-Presti). The joint venture agreement concerned the development of a block of apartments on Bondi Road.
3. At the time of the joint venture agreement, Selected was the registered proprietor of five units and Lo-Presti was the registered owner of one unit. Bondi Road had exchanged contracts to purchase the remaining three units and also exchanged contracts to purchase two properties where cottages were erected. The purpose was to amalgamate the two properties with the block of apartments next door and built one much larger and brand new apartment block. The development did not proceed and the properties remained undeveloped.
4. The case demonstrates that drawing up an ad hoc settlement agreement under considerable pressure can cause issues in the future if the terms are not given enough attention.

### First proceeding

5. On 21 February 2020, Bondi Road commenced the proceedings in the commercial list of the Supreme Court seeking specific performance of the joint venture agreement.
6. The proceedings were commenced in the commercial list rather than the real property list partly due to the importance of having the case heard quickly given the significant holding costs associated with sitting on an idle development site. The real property list is also able to accommodate urgent hearings.
7. Another reason why the decision was made to commence the proceedings in the commercial list was due to the fact that the case initially boiled down to a question of contractual construction as opposed to being one about interests in real property.

8. In March 2020, the parties entered into a settlement agreement which was essentially in the same terms as if an order had been granted for specific performance. However, the settlement did not proceed.
9. The settlement agreement provided for the defendants to transfer their apartments in the old apartment block to Bondi Road in return for payment of \$4.5 million. Bondi Road did not pay the sum within 28 days, as stipulated in the settlement agreement. The defendants argued Bondi Road did not perform its obligations.
10. In April 2020, Selected and Lo-Presti served on Bondi Road a notice to complete calling for completion to take place on 13 May 2020. On 21 May 2020, Selected and Lo-Presti served on Bondi Road a notice of termination in which they purported to terminate the settlement agreement on the basis that Bondi Road had repudiated it.

### Second proceeding

11. The second proceedings were then commenced, in which construction of the settlement agreement was the critical issue in the second set of proceedings.
12. Bondi Road claimed a declaration that the notice of termination is void, a declaration that it is entitled to have the settlement agreement specifically performed, an order that Selected and Lo-Presti specifically perform their obligations under the settlement agreement and damages. The Court ultimately held that Bondi Road was entitled to the relief sought.
13. It was identified that the settlement agreement was a contract for the sale of land. Bondi Road argued that under section 52A of the *Conveyancing Act 1919* (NSW), it would therefore be deemed to include certain terms and conditions, including those prescribed by the *Conveyancing (Sale of Land) Regulation 2017* (NSW). The regulations state that a contract for the sale of land must include a term that the vendor provide a current land tax certificate and, until the vendor does so, the purchaser does not have to complete the sale until 14 days after service of the certificate.
14. Before the hearing, Selected and Lo-Presti maintained that the settlement agreement was not a contract for the sale of land. At the hearing, the defendants went with a different argument, which was that the agreement could be terminated.
15. Selected and Lo-Presti argued the contract fell within one of the exceptions provided for in the *Conveyancing (Sale of Land) Regulation 2017* (NSW) which affected the requirement that a land tax certificate be provided. The relevant exception was for a contract between co-owners whereby a co-owner acquired the interest in the property of the other co-owner.
16. The parties could not be legal co-owners because each of them held certificates of title as the registered owners of separate parcels of the same strata plan. The only way Bondi Road and the defendants could be co-owners is if they were co-owners in equity. For the defendants to succeed on that argument, they would have had to persuade the Court that somehow, Bondi Road Developments had an equitable interest in the defendants' properties arising under the joint venture agreement or otherwise.

17. The Court found that the joint venture agreement did not give Bondi Road an equitable interest in the units. Given Bondi Road and the defendants were not co-owners in equity by reason of having entered into the joint venture agreement, it meant that the exemption for the defendants having to supply the land tax certificate did not apply. Because the defendants had not supplied the land tax certificate 14 days before calling for completion, they had not met the prerequisites for being able to require completion of the contract for sale of land constituted by the settlement agreement. This meant Bondi Road had not repudiated the contract for sale of land contained in the settlement agreement. Therefore, there was no right for the defendants to purport to terminate it and Bondi Road had standing to call for specific performance of the settlement agreement.
18. The critical clauses in the joint venture agreement provided that Selected would give Bondi Road and its agents, servants, contractors and employees full and free access and control of the existing units at all times to carry out the development and complete the project. It provided that Selected shall remain the unencumbered legal and beneficial owner of the units and will not transfer the units or create any interest in the units except with the prior consent of Bondi Road until the completion of the development.
19. There was a question about what existing apartments were contemplated by the clause and whether it was the existing apartments in the old building that was demolished or the apartments in the new building that was going to be constructed. The Judge found that the clause was referring to the units in the existing old block. Because the clause said that the defendants retained the full, equitable ownership in those units, they could not be co-owners in equity with the developer.
20. The joint venture agreement also contemplated that the developer would have all the units transferred to it, a new strata plan would be developed and then they would split the units in the new strata plan between the developer and defendants.
21. The defendants contended that the prohibition in the clauses on them transferring or encumbering their interest in the property somehow countenanced the existence of an equitable interest in the old units. The Judge disagreed with that argument and stated that the prohibition on the defendants being able to do anything with their units was consistent with the whole commercial purpose of a property development agreement. This was not sufficient on its own to give rise to any kind of equity or equitable coownership between the developer and the defendants who are contributing their units to the development.
22. The construction of the joint venture agreement informed the construction of the settlement agreement. The Court read the settlement agreement in the context of and by reference to the original joint venture agreement. The defendants pointed to a clause in the joint venture agreement that said that title to the defendants' units shall remain in the name of the defendants and that the defendants shall hold the units for and on behalf of the joint venture.
23. The Judge found that the reference must be a reference to the existing units, not the future units. He rejected the contention that holding the units on behalf of the joint venture meant

that there was somehow held on trust, observing that Bondi Road was not a joint venture vehicle.

24. The defendants also argued that a recital in the joint venture agreement meant the defendants have agreed to make their units available for the development in accordance with the terms of the agreement. The Judge rejected that argument and said that it is nothing more than stating that they are available to be developed, and there was not any intention to confer any kind of equitable ownership conveyed by those words. He said the development agreement also contemplated that the developer would pay rent to the defendants pending the block being developed. This was inconsistent with Bondi Road being a co-owner of the units or having an equitable interest.
25. The Judge found that the settlement agreement was a contract for the sale of land within the meaning of section 52A of the *Conveyancing Act 1919* (NSW). It followed that a land tax certificate was required. He declared that the purported notice of termination was invalid and made an order that the settlement agreement be specifically performed.
26. The orders included a declaration that the plaintiff is entitled to have the settlement agreement specifically performed and carried into effect and an order that the defendants specifically perform their obligations under the settlement agreement. The wording of the order was partly due to the wording of the summons and prayer for relief. There is value to leaving these vague because it is implicit in the reading in the judgment as to what is required. Being overly prescriptive, such as specifying dates and specific actions, makes it almost impossible to provide for all the contingencies that need to fall into place in order for the agreement to be specifically performed. The form of the orders and a summons seeking specific relief should be self-consciously vague and simply state that what is requested is specific performance. This leaves it open to how specific performance is finally achieved. As a fallback, the Judge made an additional order that should the defendants not comply with the orders, then the Registrar of the Court is empowered to do all things necessary to specifically perform the agreements.
27. There was still a question of damages because the developer maintained that it incurred substantial holding costs as a result of all the delays in being able to obtain transfers and properties and get on with the developments. The question as to damages were set down for a separate hearing.

## **BIOGRAPHY**

### Julian O'Sullivan

Barrister, 13 Wentworth Chambers, Sydney

Mr O'Sullivan was admitted to practice as a solicitor in March 1996. He worked in the dispute resolution group of King & Wood Mallesons, one of Asia-Pacific's leading law firms, and in the intellectual property, IT and communications group of Linklaters, a London "magic circle" firm. He was called to the bar in 2003. He regularly appears in a wide range of commercial disputes and is experienced in representing clients in all courts and in private arbitrations.

### Nicholas Simone

Barrister, 13 Wentworth Chambers, Sydney

Mr Simone was called to the bar in 2020. He accepts briefs in all areas of law. His current practice comprises a broad range of commercial litigation with a focus on contractual, tortious and professional negligence disputes. He regularly appears in all NSW and Federal courts and tribunals, both led and unled.

## **BIBLIOGRAPHY**

### Legislation

*Conveyancing Act 1919* (NSW)

*Conveyancing (Sale of Land) Regulation 2017* (NSW)