

CUZENO PTY LTD V. POWERCELL PTY LTD [1999] NSWCA 344

Court of Appeal of NSW – 22 September 1999

FACTS

Powercell entered into a contract with Cuzeno for building works on land owned by Cuzeno. Powercell was to be paid by becoming the registered proprietor of 9 of the 18 units to be built on the land. Powercell then entered into contracts with purchasers to sell these units.

The original contract between Powercell and Cuzeno was later amended to provide that Powercell would be paid money instead of owning the 9 units. The trial judge found that Cuzeno also agreed to take responsibility for the existing contracts for the purchase of the units. One purchaser, Grasso, sued Powercell for breach of contract and Powercell claimed damages from Cuzeno.

ISSUES

Was the change to the original building contract an unsuccessful novation and thus unenforceable?

Did the fact that the change to the original contract was not in writing render it unenforceable?

FINDING

The change to the building contract was not a novation. The parties agreed to make Cuzeno responsible for dealing with the purchase of land from Powercell and did not intend to novate the purchase contracts.

There was part performance of the change to the original contract as Powercell's solicitors made requests for Cuzeno to sign new contracts with the purchasers. Part performance may overcome the lack of a written contract.

QUOTE

Priestly JA said:

"I do not think there is any rule of contract law, which prevented Cuzeno from agreeing with Powercell to take over Powercell's contract with Mr Grasso. Such an agreement would bind Cuzeno to take over, that is become the vendor in, the contract with Mr Grasso, and to take all necessary steps to bring that about. If Cuzeno should prove to be unable to achieve the result it had agreed with Powercell, that would mean it would be in breach of its contract with Powercell. In other words, by such an agreement, Cuzeno was assuming the risk that Mr Grasso might not agree to contract with it on the same terms as those in the contract with Powercell and leaving itself open to the consequences if he did not."

"In my opinion, in the present case, the bringing to an end on 19 July 1996 of the land and building contracts of 27 March 1996, the entry on 19 July 1996 into the new building contracts and the subsequent letters by Powercell's solicitor to its purchasers of 1 August 1996 were all acts which fall within the description of being "unequivocally and in their own nature referable to some contract of the general nature

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of” as that found by the judge to have been on the 19 July 1996. Accordingly, in my opinion the judge did not err in deciding, in regard to the question the parties have left for his decision, that as a matter of substantive law there had been part performance by Powercell of its agreement with Cuzeno, and Cuzeno should not be allowed to rely upon section 54A of the Conveyancing Act.”

IMPACT

When amending or varying a contract it is important to consider the effect of the change or variation on third parties.

In this case Powercell had been successfully sued by a purchaser and was lucky that it was able to convince the court that Cuzeno had agreed to take responsibility for the purchasers.

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