

MERCATOR PROPERTY CONSULTANTS PTY LTD V SUMAMPOW [2000] WASC

Supreme Court of Western Australia – 16 June 2000

FACTS

Mercator had acquired 10% of the shares in the company owning the Christmas Island Resort (“the Casino”) while 90% of the shares were acquired by Sumampow. A Deed between Mercator and Sumampow provided that Mercator would sell its shares in the Casino to Sumampow subject to the satisfaction of conditions precedent by 15 August 1997. On 10 December 1997, Sumampow confirmed that all the conditions precedent had been fulfilled and he submitted two Deeds which purported to vary the original Deed. The new deeds were executed by Mercator.

Sumampow paid the first instalment of the remaining purchase price for the shares but the balance of \$4.5million was not paid. After numerous delays in the negotiations to finalise the sale of the shares, Mercator applied to the Federal Court to appoint a receiver to manage the affairs of the Casino as the authorities were threatening to cancel the casino licence due to the Casino failing to meet its financial commitments.

On 28 July 1998 the casino licence was cancelled and on 29 July 1998 the Court appointed a receiver. Mercator sued for the unpaid balance owing for the sale of the shares and Sumampow counter sued for the moneys already paid to Mercator.

ISSUES

1. Did the application to appoint a receiver breach an implied term in the contract?
2. Had the original deed been discharged when the conditions precedent were not fulfilled on 15 August 1997?

FINDINGS

1. An implied term of the Deed was that Mercator act in good faith and not frustrate the good performance of the Deed or diminish the value of its shares and enable Sumampow to have the benefit of the Deed. The Court concluded that the appointment of a receiver was made in good faith and for the sole purpose of preserving the Casino by trying to prevent the cancellation of its casino licence.
2. The parties cooperated to satisfy the conditions precedent and in such situation the non-fulfillment within the specified time did not automatically discharge the contract. Furthermore, Sumampow treated the contract as remaining on foot, particularly as he requested an extension of the time for payment and the acknowledgement that the conditions precedent had been fulfilled in time.

QUOTE

Heenan J said:

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“The conditions precedent should be construed as precedent to performance not precedent to formation. In this case the parties took considerable time and cooperation of both parties to fulfil the conditions. In such circumstances the non-fulfilment within the time specified does not automatically discharge the contract.”

IMPACT

The fact that the parties to a contract do not satisfy conditions within the stipulated time does not automatically discharge the contract.

If the parties treat the contract as remaining on foot and have a common understanding to fulfil the conditions at another agreed time, then the conditions are still relevant.

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