



## New South Wales Supreme Court

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<b>CITATION :</b>	<b>Donnellan v Garlick [2006] NSWSC 132</b>
<b>HEARING DATE(S) :</b>	31 January, 1 and 8 February 2006
<b>JUDGMENT DATE :</b>	20 March 2006
<b>JURISDICTION :</b>	Equity Division
<b>JUDGMENT OF :</b>	Windeyer J at 1
<b>DECISION :</b>	Judgment for the plaintiff for \$28,697.85 and declaration as to entitlement to forfeit deposit.
<b>CATCHWORDS :</b>	CONVEYANCING - vendor and purchaser - purchaser failing to complete contract - termination by vendor - whether termination valid - claim for damages pursuant to contractual right to claim loss on resale - calculation of damages
<b>CASES CITED :</b>	Carpenter v McGrath (1996) 40 NSWLR 39 Jampco Pty Ltd v Cameron (No 2) (1985) 3 NSWLR 391; [1986] NSW ConvR 55-275

<b>PARTIES :</b>	Suzanne Ariane Larissa Donnellan (Plaintiff) John Andrew Garlick (Defendant)
<b>FILE NUMBER(S) :</b>	<b>SC 1875 of 2005</b>
<b>COUNSEL :</b>	Mrs J Baxter (Plaintiff) In Person (Defendant)
<b>SOLICITORS :</b>	In Person (Plaintiff) In Person (Defendant)

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**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION**

**WINDEYER J**

**MONDAY 20 MARCH 2006.**

**1875/05 SUZANNE ARIANE LARISSA DONNELLAN V JOHN ANDREW  
GARLICK**

**JUDGMENT**

**Outline**

1 The plaintiff, Suzanne Donnellan (Donnellan), as vendor, sold to the defendant John Garlick (Garlick) as trustee of the Arwen Trust as purchaser, property 88 Berowra Waters Road, Berowra under contract of sale dated 31 May 2004. The sale price was \$640,000.00

2 Garlick failed to complete within the time specified in the contract. He failed to complete in accordance with a notice to complete. Donnellan terminated the contract. She sues for damages not for breach of contract but pursuant to her rights under the contract.

## Other facts

3 The contract was entered into on 31 May 2004. It provided:

(a) For completion by the earlier of six months from its date or twenty one days after the determination of a particular development application lodged by Garlick with Hornsby Council.

(b) For interest on the unpaid balance of the purchase price at 13% per annum if completion did not take place accordingly.

(c) That the deposit of \$64,000.00 be paid as follows:

- (i) \$19,200.00 on exchange, to be released to the vendor immediately;
- (ii) \$32,000.00 on 11 June 2004;
- (iii) \$12,800.00 on or before completion;

and that if the purchaser defaulted and the vendor terminated at a time when the full deposit remained unpaid then the vendor was entitled to recover the unpaid amount as liquidated damages.

(d) That while Garlick purchased as trustee he was personally liable under the contract.

## Special Condition 41.5

4 Special condition 41 under the heading "Deposit" provided, inter alia, as follows:

### 41. Deposit

...

(3) In the event that:

- (a) the purchaser defaults in observance of any obligation in this contract which is, or the performance of which, has become essential; and
  - (b) the purchaser has paid a deposit of less than ten percent (10%) of the purchase price; and
  - (c) the purchaser or vendor have not terminated this contract under clause 45;
- (d) and the vendor terminates this contract then the vendor shall be entitled to recover from the purchaser, an amount equal to ten per cent (10%) of the purchase price less any deposit paid, as liquidated damages and it is agreed that this right shall be in addition to and shall not limit any remedies available to the vendor herein contained or implied notwithstanding any rule of Law or equity to the contrary. This special condition shall not merge upon completion of this contract.

...

(5) The purchaser specifically acknowledges and agrees that in consideration of the vendor entering into this contract, if the vendor becomes entitled to terminate this contract as a result of the purchaser's default, the purchaser is aware that the damage that the vendor will suffer as a direct result of the purchaser's default specifically include the following and the purchaser acknowledges that the vendors damages recoverable in addition to, but not limited to, the other amounts as stated in this clause 41 will include the following matters which the purchaser acknowledges the vendor will suffer as a direct result of the purchaser's breach:

(a) the Development Consent from Hornsby Council dated 17 October 2003 may have expired or have been overridden by any later development application lodged by the purchaser in accordance with clause 42, if any, and the purchaser agrees to be liable for any cost, expense or delay incurred by the vendor in reinstating the Development Consent or if such Development Consent cannot be reinstated, in lodging a development application in similar form and substance which includes the time and cost involved in obtaining development consent to such development application in a form similar to the Development Consent dated 17 October 2003. The purchaser expressly agrees and acknowledges that this is an essential term of the contract and the purchaser will be liable in the event of its default for all such associated costs in reinstating the same Development Consent or obtaining a similar development consent to that existing at the date of this contract if the existing development consent is no longer operative for whatever reason. This liability is in addition to the liability for the deposit as stated in clause 41(1) and any other liabilities contained in this contract.

(b) In consideration of the vendor entering into this contract, the purchaser expressly agrees and acknowledges that part of the damages the vendor will suffer as the result of the purchaser's default, if any, is the payment of a 2.25% NSW State vendor tax (being an approximate amount of \$14,400) which becomes or became operative after the date of this contract. The purchaser agrees that if the purchaser defaults on its performance of this contract, the vendor will be required to pay this tax which the vendor would not have been otherwise liable to pay if it were not for the purchaser's default and the purchaser therefore agrees to reimburse or compensate the vendor for this amount upon the termination of this contract in addition to any amount payable under clause 41(1) or any other liabilities

contained in this contract. The purchaser expressly agrees that this is an essential term of the contract. This clause does not merge on completion.

It will be seen 41.5 has nothing to do with the deposit but I think nothing turns on that.

5 \$19,200.00 was paid on entering into the contract and \$32,200.00 was paid on 8 June 2004. As \$200.00 more than required was paid by the second instalment the third instalment due which remained unpaid was \$12,600.00. Under the terms the completion date was 30 November 2004. Garlick did not complete. Notice to complete requiring completion on 22 December 2004 was served. The vendor was ready willing and able to complete and the purchaser failed to complete. Notice of termination was served on 23 December 2004.

### **The first question - was the termination valid?**

6 There is no doubt that the termination was valid. It was not argued that it was not. The vendor was able to settle and Garlick as purchaser did not settle, either on the date fixed by the contract or on the date made essential by the notice to complete.

### **Damages**

7 Although at the time these proceedings were commenced the property had not been resold it was subsequently resold and the summons was amended to claim loss on resale. Clause 9 of the contract provides that after termination the vendor can keep or recover the deposit to a maximum of 10% of the purchase price and:

9.3 sue the purchaser either -

9.3.1 where the vendor has resold the property under a contract made *within* 12 months after the *termination*, to recover -

§ The deficiency on resale (with credit for any of the deposit kept or recovered and after allowance for any capital gains tax or goods and services tax payable on anything recovered under this clause); and

§ The reasonable costs and expenses arising out of the purchaser's non-compliance with this contract or the notice and of resale and any attempted resale; or

9.3.2 to recover damages for breach of contract.

8 The property was resold under contract for sale dated 23 July 2005 for a purchase price of \$600,000.00.

9 There was no objection made at the commencement of the hearing to the claim for loss on resale. The notice to complete stated that was the action that would be taken by the vendor. I do not consider that there was an irrevocable election to recover damages for breach of contract, rather than those recoverable under 9.3.1. I did re-list the matter to allow any further submissions on this. While Mr Garlick was unrepresented he made none. The plaintiff, who then appeared in person made it clear she was seeking loss on resale. It is proper to say that unless this were made clear the amended summons would give grounds for confusion. In it the plaintiff seeks first declarations that the contract was validly

terminated and that the deposit of \$19,200.00 paid to her has been forfeited; secondly for orders that the defendant do what is necessary to cause the deposit held by the agent to be released to her and that the defendant pay her the balance deposit of \$12,600.00; and thirdly an order for damages for breach of contract in the sum of \$26,775.11.

10 The following items are claimed by the plaintiff as are particularized in the amended summons as making up the claim for \$26,775.11:

a.	Loss on resale	\$ 40,000.00
b.	Land Tax	\$ 5,670.00
c.	Mortgage payments from termination to resale (this claim was not pressed)	\$ 22,273.94
d.	Costs on unpaid purchase price (namely credit card interest)	\$ 9,773.38
e.	Water Rates from termination to 26.8.05	\$ 288.21
f.	Council rates for the same period	\$ 708.56
g.	Insurance premiums for the same period	\$ 337.21
h.	Conveyancing costs	\$ 275.65
i.	Consultants expenses	\$ 495.00
j.	Advertising expenses on resale (incorrectly stated as \$2331.00)	\$ 2,231.00
k.	Miscellaneous costs of photocopying development application, etc. (incorrectly stated as \$72.10)	\$ 72.70
l.	Vendor duty tax	\$ 13,500.00
m.	Costs of reinstating lapsed development application pursuant to clause 41.5(a)	\$ 379.75
n.	Interest on outstanding purchase moneys from the completion date to termination	<u>\$ 4,612.04</u>
	A: Sub-total	\$100,617.44

Less		
a.	Net rental income	\$ 9,234.73
b.	Default interest paid by resale purchaser	\$ 532.60
c.	LPI registration fee on discharge of mortgage	<u>\$ 75.00</u>
	B: Sub-total	(\$ 9,842.33)
Less		
	Deposit C:	(\$ 64,000.00)
A-B-C =		\$26,775.51

11 This seems a complicated manner of dealing with the matter until it is identified that \$12,600.00 is claimed in addition to the \$26,775.51 making a total of \$39,375.51 plus interest. Whatever the complications the plaintiff's claim is for forfeiture of the deposit and whatever is claimable under clause 9.3.1 and any special condition giving entitlement to a further amount.

12 There was evidence to establish the amounts of the claims pursued if such claims were justified. I will accordingly deal with them in turn apart from the deposit claim which I will consider at the end.

a. h. & n. Loss on resale and default interest costs

These items should be considered together. The default interest cost is the interest from the date fixed for completion to the date of termination. The proper treatment of the interest item is explained in ***Carpenter v McGrath*** (1996) 40 NSWLR 39 per Clarke JA at 46 and Sheller JA at 60. It should be added to the purchase price when determining the loss on resale. As the figures should be net figures it is accepted there should also be taken into account agents commission which would have been payable on sale and the commission on resale - together with disbursements for zoning certificates and the like. The figures are:

	Sale		Resale	
<b>Sale Price</b>		644,612.04		600,000.00
<b>Commission</b>	14,080.00		13,200.00	
<b>Disbursements</b>	110.00	14,190.00	275.00	13,475.00

<b>Net</b>	630,422.04	586,525.00
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**Loss on resale** \$43,897.04

b. Land Tax

The evidence did not establish the figure claimed. It did however establish that the tax attributable to the land the subject of the contract, presumably on the basis it was the only land owned by the vendor, was \$1900.00 and that the adjustment on the resale resulted in the vendor paying \$1238.90. That was an expense attributable to the default and recoverable.

c. & d. Mortgage and credit card interest

These claims were not pursued. This was announced by counsel for the plaintiff at the beginning of day 2 of the hearing accepting the decision in *Jampco Pty Ltd v Cameron (No 2)* (1985) 3 NSWLR 391; [1986] NSW ConvR 55-275. I should in any event follow that decision as to mortgage payments. There could be no doubt the claim for credit card interest is unsustainable. It follows however that the credit given for rental income should be disregarded.

e, f & g Rates and insurance .

In the same way as the land tax, the apportioned amount from termination to resale was an expense arising through the default and is recoverable.

j. Advertising expenses .

This is a cost of default. The evidence in Exhibit B shows no costs for advertising for the first sale. The amount is recoverable.

i. Consultants expenses

The cost of retaining an hydraulic engineer was not established by the evidence to be an expense arising from default.

k. Miscellaneous costs

These were not established as a necessary or direct expense. The claim is too remote and fails.

l. Vendor duty tax

This was covered by special condition 41(5)(b) of the contract. It was an expense arising from default. In any event under the particular terms of clause 41(5)(b) the amount is recoverable in addition to "any other liabilities contained in this contract". While that wording is less than perfect I think it clear that it imposed an additional liability on the vendor payable in the event of default irrespective of whether the claim was based on the contractual right under 9.3.1 or a claim for damages for



breach of contract under 9.3.2.

m. Reinstatement of Development Application

This is a direct cost of default and a contractual entitlement. It should be allowed.

**The amounts to the vendor's credit are therefore as follows:**

Loss on resale	\$43,897.04
Land Tax	\$ 1,238.90
Vendor duty tax	\$13,500.00
Water Rates apportionment	\$ 288.21
Council rates	\$ 781.56
Insurance	\$ 337.21
Advertising expenses	\$ 2,231.00
Development application	<u>\$ 379.75</u>
	\$62,653.67
The accepted debits amount to	<u>(\$ 607.60)</u>
Balance	\$62,046.07

This leaves me to deal with the question of the deposit. The instalments of deposit paid to the vendor and the agent total \$51,400.00 so that leaving aside the interest question the plaintiff is entitled to \$10,646.07.

**Interest**

13 The vendor was entitled to forfeit the deposit on termination. The defendant refused to authorize the agent to pay the \$32,200.00 to the vendor. The plaintiff is entitled to interest on that figure from termination to date and on the balance of \$12,600.00 which became payable on termination. The interest on the total of \$44,800.00 is \$4,926.77. In addition the plaintiff is entitled to interest on the sum of \$10,646.07 from resale date 26 August 2005 to date which amounts to \$525.01. The total interest is therefore \$5,451.78.

Thus the final figures are:

Loss on resale after credit for deposit payable	\$ 10,646.07
Deposit unpaid	\$ 12,600.00
Interest	<u>\$ 5,451.78</u>
Total	\$ 28,697.85

The plaintiff is entitled to judgment for that sum and to a declaration that she is entitled to the deposit figure held by the agent with an order the defendant sign any documents necessary to bring about payment to the plaintiff. The agent is not a party but in light of the declaration should feel free to make payment without further authority.

### **Final remarks**

14 Some comments I made during the hearing about the strange conduct of the defendant appear in the transcript of the proceedings, which was taken down. I will not repeat these. Some at least of the behaviour of the defendant seemed to result from supposed advice or assistance given him by persons in court. The defendant sought to conduct his case as he did. That was a matter for him. It is fair to say that he indicated he wanted the plaintiff's claim settled by court determination, and made no effort to resist it or to rely on the pleaded defence.

15 In the course of the defendant's case a number of quite inappropriate documents were sent to the court and to my chambers. These remain on the file. Insofar as they were subject to notarial attestation, that action appears on its face to have been quite improper. It is the task of Public Notaries by notarial act to witness signatures and to authenticate legal documents having established the identity of the person signing or executing such documents and having ensured that person understood the document to be signed. It is not the task of Public Notaries to authenticate documents which have no meaning, and which cannot bear on the litigation concerned. Such conduct can only bring Notaries into disrepute with the long term result that notarial certification by New South Wales Notaries will be regarded as having no value, force or effect. These comments relate to documents entitled "Letters Rogatory", "Deed of Security", "Certificate of Protest and Non-Response", which have found their way to the file. I propose to direct that a copy of these reasons be forwarded by the Registrar in Equity to the New South Wales Society of Notaries and to the two Public Notaries responsible. As the notaries are not and have not been the solicitors for the defendant and have not been heard I do not propose to refer the matter to the Legal Services Commissioner to consider whether there has been conduct which requires investigation. I place on record, however, that if similar circumstances

arose again I would almost certainly do so.

### **Judgment, declaration and orders**

1. Declare the contract for sale of land dated 31 May 2004 has been validly terminated.
2. Judgment for the plaintiff against the defendant for \$28,697.85.
3. Declare that the instalments of deposit paid by the purchaser have been forfeited to the vendor.
4. Declare that the part deposit of \$32,200 paid to Keith Soames Real Estate (Thornleigh) Pty Ltd has been forfeited to the plaintiff, who is entitled to such sum.
5. Order the defendant sign any documents required by the said agent to bring about payment to the plaintiff.
6. Order the defendant pay the plaintiff's costs of the proceedings.
7. Exhibits may be returned.
8. Liberty to apply.

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