

MK & JA ROCHE PTY LTD & ORS v METRO EDGLEY PTY LTD & ANOR
[2005] NSWCA 39
Supreme Court of New South Wales – 3 March 2005

FACTS

In December 2002, the Luna Part Reserve Trust entered into a Deed of Agreement for Sub-lease of the Luna Park Reserve to Metro Edgley Pty Limited ('Metro') for Metro to undertake the development of Luna Park, including the construction of the Waterfront Brasserie ('WB'). In September 2003 M.K & J.A Roche Pty Limited ('Roche') purchased a forty-year lease of the WB under an agreement that provided that Roche was to pay a \$2 million deposit on entry into the agreement and Metro was to perform certain building works for the WB. Clause 2A(b) of the agreement provided for automatic rescission if these conditions were not satisfied by 31 December 2003 or such later date if Metro notified Roche in writing up to 31 December 2004. The agreement also contained a clause that provided for the refund of the deposit if Roche lawfully rescinded or terminated the agreement. Metro carried out works under the agreement and notified Roche in writing that the date for completion would be extended to 31 March 2004 and then provided, in March, verbal notice that this date was further extended to 30 June 2004. In March 2003 Roche became aware that non-satisfaction of the clause 2A conditions precedent had terminated the contract, but continued to work with Metro. On 21 May 2004, Roche sent a letter detailing the conditions giving rise to automatic rescission, and claiming the \$2 million deposit. Metro's reply alleged that oral notice for extension was given and that from 31 March until 21 May 2004 both parties had participated in the building works. It also purported to give written confirmation of the extension agreed to on 2 March 2004. Roche commenced proceedings, the judge at first instance finding that the agreement was valid and had been extended to 30 September 2004.

ISSUE

Whether the affirmation of the Contract had occurred.

FINDING

The Court of Appeal held that Roche's actions prior to 21 May 2004 could be sufficient to amount to a binding election to affirm the contract. The Court of Appeal considered that the attendance at site meetings, making arrangements for the continuation of works in accordance with plans approved by Roche, the notification of a change of plans and the continued procuring of co-operation by Metro to achieve satisfaction of the conditions precedent, were matters adverse to Metro to which Roche would have had no entitlement but for the continued operation of the Contract. Accordingly, Roche had elected to affirm the Contract.

QUOTE

Hogson JA at paragraph 62 referred to the relevant principle in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 658: "If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. Such conduct is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon. It is with these considerations in mind that the law attributes to the party the making of a choice, though he be ignorant of his alternative right. For reasons stated earlier the affirming party cannot be permitted to change his position once he has elected."

IMPACT

A party who is aware of a breach entitling them to terminate a Contract and who exercises its rights under the Contract may affirm the Contract.

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