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Contents

Misleading and deceptive conduct

4 Airstrike Industrial Pty Ltd v Robertson [2013] QCATA 043
In this decision, QCAT’s Appeals Tribunal examines agents’ duties of disclosure to prospective buyers, particularly in relation to future matters.

8 Australian Competition and Consumer Commission v Metricon Homes Qld Pty Ltd [2012] FCA 797
This Federal Court decision serves as a warning to all developers, sellers and sales agents of the need to ensure that their advertising and promotional material does not contain any future or misleading information.

Negligence/bodily injury

11 Morris v Redland City Council & Anor [2015] QSC 135
In this recent Supreme Court decision, Carter Newell were successful in defending a personal injury claim brought against Ray White, North Stradbroke Island and in obtaining an indemnity costs order against the unsuccessful plaintiff.

Valuer’s liability

14 Propell National Valuers (WA) Pty Ltd v Australian Executor Trustees Limited [2012] FCAFC 31
This appeal before the Full Federal Court not only highlights the obligations of valuers, but also confirms the long established principle that post-valuation comparable sales are inadmissible.

Planning and environment

16 Politicising our environment
Is the National Review of Environmental Regulation a serious platform for change or simply a ‘soap box’?

Sale and purchase contracts

18 Simpson & Ors v Jackson [2014] QSC 191
This Supreme Court decision serves as a timely to real estate agents, and buyers and sellers of property, of the need to strictly adhere to the precise terms and conditions of sale and purchase contracts.

22 The use of Option Agreements in development transactions
An examination of some ‘tips and traps’ in relation to the use of options agreements in the acquisition and disposal of property.

Intention to create legal relations

26 Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd [2015] QSC 119
Formation of contracts where no formal contract - can an email chain constitute a contract?

Planning Law

30 Sunshine Coast Regional Council v Parklands Blue Metal Pty Ltd [2015] QCA 91
The Court of Appeal confirmed that the Parkland Blue Metal quarry can proceed because of the future need for quarrying products in the local and wider area, and also confirmed that the need for the development must be determined from the perspective of the community as a whole, and not just particular members of it.

An intention to contract

34 Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd [2015] WASCA 21
Where a tenant and landlord were held to have entered into a binding agreement for a new lease and licence on terms concluded by an exchange of emails between the parties, although a signed formal lease and licence had not been signed by them.
Carter Newell is proud to add the Property and Real Estate Gazette to its suite of publications. This Gazette provides useful, practical and current information to the property and insurance industries. The Property and Real Estate Gazette aims to provide readers with a succinct but comprehensive perspective of relevant cases which have been considered by the courts throughout all Australian jurisdictions. This inaugural edition focuses on cases related to the formation of contracts, intention to create legal relations, misleading and deceptive conduct, negligence/bodily injury, planning and environment reform, planning law, sale and purchase contracts, and valuer’s liability.

As a leading provider to the commercial property and insurance industry and with the philosophy of sharing knowledge, our team of experienced property and insurance lawyers have gathered, collated and analysed these cases and law updates to assist the industry in keeping up to date with the latest information. We trust our inaugural Property and Real Estate Gazette will be a useful guide for readers.

Dr Peter Ellender
CEO

Contributing Editors

Bronwyn Clarkson
Partner
07 3000 8346
bclarkson@carternewell.com

Michael Gapes
Partner
07 3000 8305
mgapes@carternewell.com

Karen Brown
Senior Associate
07 3000 8377
kbrown@carternewell.com

Johanna Kennerley
Senior Associate
07 3000 8308
jkennerley@carternewell.com

Jayne Wambaa
Associate
07 3000 8486
jwambaa@carternewell.com

Contributing Researchers

Elly Brand
Solicitor

Brett Sherwin
Graduate Lawyer

Tom Pepper
Graduate Lawyer
Carter Newell Lawyers… an award winning firm.
Case Note

Airstrike Industrial Pty Ltd v Robertson [2013] QCATA 043

In this decision, QCAT’s Appeals Tribunal examines agents’ duties of disclosure to prospective buyers, particularly in relation to future matters.
In this case note, we consider the decision of Airstrike Industrial Pty Ltd v Robertson [2013] QCATA 043 by the Appeal Tribunal of the Queensland Civil and Administrative Tribunal (Tribunal) in relation to a claim for $200,000 under the former Property Agents and Motor Dealers Claim Fund (PAMD Claim Fund). ¹

In this matter, the buyers of a commercial property, Mr and Mrs Robertson, alleged that the agency (and its sales agent) had breached s 574 of the Property Agents and Motor Dealers Act 2000 (Qld) (PAMD Act) (which was in force at the relevant time). Section 574 provided that, inter alia, an agent, a licensee or registered employee must not represent in any way to someone else, anything that is false or misleading in relation to the letting, exchange or sale of property (a similar prohibition against a licensee or real estate salesperson making false or misleading representations is contained in s 212 of the Property Occupations Act 2014 (Qld)).

Background

Mr and Mrs Robertson were interested in securing suitable premises to open a fast food takeaway business. In 2006, they inspected a large industrial estate which was in development in Upper Coomera. At the time of their inspection, there was a temporary access road which provided a means of access to the site. The street, on which the commercial unit which the Robertsons ultimately purchased was located, was shown to be a dead end. The Robertsons alleged that they had expressed concerns to the sales agent about the suitability of access to the site. The sales agent informed them that the current access road was only a temporary arrangement, and that the dead end currently on the street where the unit was located would be extended to connect with a nearby main road.

This information had been obtained from Decision Notices published by the Gold Coast City Council, together with the project brief prepared by the developers. By 2011, the street had not been connected to the main road and the Robertsons issued a claim under the PAMD Claim Fund. The claim was referred for hearing in the Tribunal.

The QCAT’s decision at first instance

In the initial Tribunal hearing, the key allegation put forward by the Robertsons was that the agent’s use of the word ‘temporary’ was misleading in circumstances where it was known that there was no timeframe for the completion of the connection road between the street and the main road.

The Tribunal essentially found that the word ‘temporary’ implied that there was a timeframe of a short term nature, despite the fact that it had been accepted by the parties that the agent had in fact qualified his statement that the access road was temporary by thereafter stating that there was no timeframe for the connection road to be completed.

Further, the Robertsons also alleged that there had been a misrepresentation by silence. In essence, it was alleged that the mere statement that the access road was temporary was misleading, in circumstances where the statement was not qualified by drawing the Robertsons’ attention to the fact that, inter alia:

• there was no funded and scheduled local government plan of development of the connection road; and

• the connection road might be delayed due to difficulties associated with it traversing private land, including the possibility of having to resume land and negotiate with landholders.

At first instance, the Tribunal found that the use of the word ‘temporary’ may have been true to the extent that the access road was not a dedicated and permanent road, however, it concluded that it was not true in a temporal sense. The Tribunal found that the word was likely to mislead the Robertsons, who inferred that the access road was only a short term arrangement.

As such, it was found that the agent should not have used the word ‘temporary’, or at least qualified his statement by informing the Robertsons that it was unknown when the connection road would be established and further, that it would require other developers to finalise their developments beforehand. Accordingly, the Robertsons were awarded $200,000 from the PAMD Claim Fund, which the agency and agent were ordered to refund.
The Appeal Tribunal’s decision

The appeal was allowed in full on the basis that the Tribunal at first instance had erred in law.

Firstly, to the extent that the Tribunal had placed emphasis on the requirement for the agent to clarify that the timeframe for the connection road was unknown, the Appeal Tribunal held that the conclusion reached was unsustainable, in circumstances where it had already been established that the agent had qualified his statement by stating that there was no timeframe.

Accordingly, the Appeal Tribunal pointed out that there is little difference between the terminology of ‘unknown’ on the one hand, and ‘no timeframe’ on the other.

Secondly, to the extent that the Tribunal at first instance found that use of the word ‘temporary’ was misleading, it was found that there was no evidence to suggest that the agent had given any impression as to the length of the time period. As such, the Appeal Tribunal held that the only way in which a temporal connotation to the word might have been inferred was through the subjective impressions of the Robertsons themselves and not objectively from the conduct of the agent.

The Appeal Tribunal found that the word ‘temporary’ must be construed in the circumstances where the Robertsons knew the access road was not permanent and where they knew that the connection road would be established in the future, but that there was no timeframe for this to occur. In essence, to find that the agent should have understood that the Robertsons apprehended that the word implied a short term period was contrary to the facts of the case.

Ultimately, the Appeal Tribunal determined that the agent had told the Robertsons all of the information he had with respect to the estate. Indeed, had he said nothing at all about access arrangements, the Robertsons would have had a basis to claim misrepresentation on the grounds of silence and non-disclosure. As such, it was observed at paragraph 50 of the Appeal Tribunal’s decision:

‘So, it seems from the Robertsons’ perspective, (the agent) would have been the subject of criticism about anything he said or did not say about the access to the estate.’

Therefore, it was found that the conclusions of the Tribunal at first instance were not open on the facts of the case and that therefore it had occasioned an error of law.

Another aspect of the case was related to clause 13 of the contract, which included the buyers’ acknowledgment that there had not been any inducement, by any representation made on the seller’s behalf to enter the contract, which was not otherwise contained in the contract itself. The issue was whether this clause protected the agency from liability. In light of the conclusions reached on the misrepresentation point, the Appeal Tribunal noted that it was not necessary to determine the clause 13 issue.

However, it observed that as the purpose of s 574 of the PAMD Act was essentially aimed at consumer protection, the better view may be that the clause may not protect an agency from liability in light of case authority regarding analogous legislation. Further, it observed that because the agency was not a party to contract, it did not see how it could seek to rely upon it.

Conclusion and best practice

Whilst this case demonstrates the limits of an agent’s responsibility not to make misleading statements, it is nevertheless clear that agents should adopt a conservative approach and provide all information within their knowledge which they consider might influence a potential buyer’s decision to purchase a property.

Further, agents should request detailed documentation and information from their seller clients in relation to the key aspects of a property. As the case demonstrates, it is crucial that agents do not put their own interpretation on the information they have been provided with. In the circumstances of this case, the agency and the agent were ultimately vindicated for having only communicated accurately the information that had been obtained from the developers and the council decision notices.

1 Carter Newell acted for the successful appellants, Airstrike Industrial Pty Ltd and its sales agent, in the appeal.
Karen Brown
Senior Associate

Karen is a Senior Associate in Carter Newell’s Commercial Property team, with over 10 years post-admission experience acting for both private and public sector clients.

Karen has extensive experience in advising clients on sales and purchase transactions for significant commercial, industrial and rural properties including CBD Office buildings, shopping centres, hotels and workers accommodation camps. She also advises clients in relation to high value leasing transactions of commercial, retail and industrial property and advises developer clients in relation to the structure and contract preparation for large scale residential, commercial and mixed use developments including the negotiation and implementation of development management agreements for master planned communities and other developments.

Karen also advises developer clients on planning and environmental matters relevant to property developments from the acquisition of sites and due diligence investigations, through to obtaining approvals and the overall completion of the developments and compliance with approval conditions.

+61 7 3000 8377
+61 410 606 639
+61 7 3000 8433
kbrown@carternewell.com
Case Note

Australian Competition and Consumer Commission v Metricon Homes Qld Pty Ltd
[2012] FCA 797

This Federal Court decision serves as a warning to all developers, sellers and sales agents of the need to ensure that their advertising and promotional material does not contain any future or misleading information.

In this decision, the Australian Competition and Consumer Commission (ACCC) instituted proceedings in the Brisbane Federal Court against a Queensland developer, Metricon Homes Qld Pty Ltd (Metricon), claiming that it had made numerous false and misleading representations and had engaged in misleading and deceptive conduct in its advertisements and brochures throughout 2009-2011.

The court found that Metricon had contravened ss 18, 29(1)(a), 29(1)(i) and 29(1)(m) of the Australian Consumer Law (ACL), which is contained in Schedule 2 of the Competition and Consumer Act 2010 (Cth) (CCA) for its conduct on or after 1 January 2011 (the date that the CCA came into force) and was in breach of the equivalent provisions in the Trade Practices Act 1974 (Cth) (TPA) for its conduct occurring prior to 1 January 2011.

Metricon was ordered to pay penalties totalling $800,000 in respect of its contraventions of the CCA and TPA and also contribute $50,000 towards the ACCC’s costs.

Background

Between January 2009 and August 2011, Metricon made a number of written and pictorial representations in its brochures, on its website and in newspaper advertisements about the houses it sold, which the ACCC alleged were false and misleading. These misrepresentations included:

1. The publication of brochures which included photographs of fittings and features (such as swimming pools and landscaping) which Metricon did not include in the advertised sale price of its houses and/or did not offer for sale at all. The brochures did not make it clear that these fittings and features were not included in the sale price (the pictorial representations conduct).
2. The advertisement of a ‘Build Time Guarantee’, whereby Metricon would compensate buyers for their rental costs if their houses were not built within a specified timeframe. However, the guarantee was subject to specific terms and conditions which excluded the majority of houses which it offered for sale. The terms and conditions of the guarantee were not displayed in its brochures and could only be found on Metricon’s website (the build time guarantee conduct).

3. The company’s ‘Home Expo Promotion’ and ‘Red Hot Rollback Promotion’ displayed a ‘list price’ and a ‘pay only price’ and the amount that could be saved by purchasing at the ‘pay only price’ during the promotions. However, the houses had not previously been offered by Metricon at all or were not offered at the ‘list price’ prior to the commencement of the promotions. The promotions were intended to make consumers believe that they were making substantial savings, when in fact this was not the case (the discount list prices conduct).

4. The publication of ‘Upgrades Package’ brochures which advertised additional fittings and features which were available for a price in the promotion that was cheaper than the standard price. In fact, Metricon had not sold most of the fittings and features at the standard price or had only sold them at a standard price on a few occasions prior to the commencement of the promotion (the upgrades package conduct).

The relevant legislation

The ACCC pursued Metricon on a number of different grounds in circumstances where it was alleged to have made various types of misrepresentations in its advertising and promotional materials.

Section 18 of the ACL (and its predecessor, s 52 of the TPA) was common to all breaches as Metricon was found to be misleading and deceptive in its advertising and promotions:

‘18 Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).’

Specifically, Metricon was also found to have made false or misleading representations as to the quality and the standards of goods it supplied in contravention of s 29(1)(a) of the ACL (formerly s 53(a) of the TPA):

‘29 (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.’
The developer also contravened s 29(1)(i) of the ACL (formerly s 53(e) of the TPA) by making false or misleading representations regarding the price of goods:

‘29 (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(i) make a false or misleading representation with respect to the price of goods or services.’

Further, Metricon made false or misleading representations in its brochures regarding the existence of a condition and the exclusion of a guarantee or right in breach of s 29(1)(m) of the ACL (formerly s 53(g) of the TPA):

‘29 (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2.’

The court’s decision

Both the ACCC and Metricon agreed that the ACCC was entitled to the relief sought and the penalties which should be imposed on Metricon. However, the court stated that it was not merely going to give effect to the wishes of the parties and that it needed to exercise a public function in determining whether the contraventions had in fact occurred and the quantum of any appropriate pecuniary penalties or other relief which should be ordered.

The court found that the contraventions had occurred and stated that a significant pecuniary penalty should be imposed on Metricon as its conduct was ‘egregious’ in the sense that:

1. it occurred over a period of time (2.5 years in respect of the build time guarantee conduct);
2. its conduct was designed to induce at least some customers to purchase a Metricon house who might otherwise have approached another builder;
3. although the parties were not aware of any actual loss or damage caused by the alleged contraventions, the cost of a Metricon house represented a very substantial commitment to the consumers involved.

The court also considered the net assets and income of the company and noted that the senior management of Metricon participated in the contravening conduct. It also concluded that Metricon’s competition and consumer compliance policies failed to prevent the contravening conduct. Another relevant factor was the court had not previously found Metricon in breach of either the TPA or CCA in any respect. Having weighed up these factors, the court imposed the following pecuniary penalties on Metricon:

1. $150,000 in respect of the pictorial representations conduct;
2. $250,000 in respect of the build time guarantee conduct;
3. $250,000 in respect of the discount list prices conduct; and
4. $150,000 in respect of the upgrades package conduct.

Metricon was also ordered to pay $50,000 towards the ACCC’s costs. It also provided an undertaking to the court that it would not make similar misrepresentations for a period of three years.

Conclusion

The underlying message from this case is that developers, sellers and sales agents must ensure that all promotional and advertising materials distributed by them comply with the ACL.

As a matter of best practice, sales agents should seek all instructions in relation to the sale of a property in writing from their developer and sellers clients and preserve those instructions on the sales file. Similarly, all advertising material and brochures should be approved in writing by the developer or seller before being published or distributed and kept on file.

Further, a comprehensive disclaimer of liability clause should appear on each page of all advertising material and the disclaimer should be drawn to the attention of all recipients of that material.

Finally, as an extra measure, developers and sales agents should implement competition and consumer compliance policies and ensure that staff have adequate training in these policies so that the correct procedures are followed at all times.
Case Note

Morris v Redland City Council & Anor [2015]
QSC 135

In this recent Supreme Court decision, Carter Newell were successful in defending a personal injury claim brought against Ray White, North Stradbroke Island and in obtaining an indemnity costs order against the unsuccessful plaintiff.

In the recent Supreme Court judgment in Morris v Redland City Council & Anor, Carter Newell were successful in defending a personal injury claim brought against Ray White North Stradbroke Island (agency), and in obtaining an indemnity costs order against the unsuccessful plaintiff.

The judgment, delivered by Justice Martin, was a vindication of Carter Newell’s assessment that the plaintiff’s claim was hopeless and one which, properly advised, he should never have pursued. Further, the judgment reflects the reluctance of the courts to impose liability on defendants in personal injury actions where the plaintiff’s injuries are the result of his own negligence.

Background

The plaintiff, Mr Andrew Morris, sustained serious injuries, resulting in his paraplegia, when he fell from a cliff on North Stradbroke Island onto Frenchman’s Beach on the evening of 5 February 2010. The plaintiff, and seven of his friends, had rented a holiday house, managed by Ray White North Stradbroke Island (agency), for his 40th birthday celebrations. The house was large and luxurious, situated on Mooloomba Road, Point Lookout, and enjoyed uninterrupted views of the ocean from its two large front decks.

The plaintiff alleged that when he collected the keys for the house from the agency office, he enquired of the rental agent as to the location of the stairs leading down the beach. The agent allegedly responded to the effect that the stairs were ‘just over the road’. The stairs to Frenchman’s Beach were in fact, situated some 100 metres from the front deck of the plaintiff’s holiday house, at the intersection of Mooloomba Road and Midjimberry Street, and were marked by signage and a street light.¹

On the evening of 5 February 2010, the plaintiff and two of his friends, after drinking for several hours,² walked from the house in search of the stairs to the beach. They walked along Mooloomba Road towards the stairs to the beach for some distance, and then
turned around and walked in the opposite direction from the stairs, and into the bush on the headland.

Their trek through the bush was punctuated by at least two rest pauses. The plaintiff and his two friends were each carrying, and drinking, beers as they walked through the bush. They had one head lamp torch and one hand torch between the three of them.

After the plaintiff and his friends had been walking through the bush for some time, the plaintiff took hold of a tree branch and leant out over the edge of the cliff to see if he could see the stairs. The tree branch broke and the plaintiff fell 20 metres onto Frenchman’s Beach, off the edge of the cliff. The plaintiff sustained serious injuries, including fractures of the spine and ribs, due to the fall. The severity of his injuries resulted in numerous dysfunctions for the plaintiff, including paraplegia.

The claim

The plaintiff commenced proceedings against the Redland City Council (council) and the agency, seeking compensation for his personal injuries. The quantum of his claim was agreed, in advance of the trial, at $2.5 million.

The claim against the council was predicated on the proposition that, in its capacity as the local government authority for the area, it had acted negligently in a number of respects: by failing to erect warning signs alerting the public to the existence of the cliff edge; failing to erect warning signs alerting the public not to walk through the grass/vegetation on the headland and failing to erect directional signage to pedestrian thoroughfares on the headland.

The claim against the agency was predicated on the proposition that the plaintiff had been given inaccurate directions to the stairs leading down to the beach by the rental agent. The plaintiff alleged that the agency had a duty to provide directions ‘more expansive than the description that was given to him’ as to where the stairs were located. It was also the plaintiff’s case that the agency ought to have warned him of the risks associated with the presence of the cliff, despite the fact that the cliff was situate a long distance from the holiday house.

In his claim against the council, the plaintiff sought to adduce evidence as to the existence of a track leading through the vegetated area on the headland, and the lack of illumination offered by any streetlights. Ultimately, the plaintiff’s case hinged on his (and the friends’) testimony that there was a well-worn track/path, leading off the main pedestrian boardwalk, along the headland, which they had followed that night to the edge of the cliff.

To contradict this allegation, the council called Ms Angela Ritchie, its North Stradbroke Island maintenance coordinator, who testified that there were no paths created by the council on the headland in the area traversed by the men. Ms Ritchie also denied that there were any ‘trodden-down man-made paths’, or any paths created by the local wildlife on the headland.

Ms Ritchie’s evidence was supported by the photographs taken by the plaintiff’s friends shortly after the incident, which did not show the path which the plaintiff and his friends said they traversed that night.

Further, the council offered evidence that there was street lighting at the road crossing, before the entry to the boardwalk, which illuminated the directional signs to the stairs to the beach.

The judgment

The plaintiff’s claim against the agency did not proceed to trial.

The plaintiff’s Queen’s Counsel informed the court that no evidence would be lead against the agency. Consequently, Martin J dismissed the claim against the agency.

The decision taken by the plaintiff’s lawyers, at the beginning of the trial, to abandon the case against
the agency was evidently prompted by their belated realisation that the case against the agency was hopeless. This assessment was supported by Justice Martin, who held that the plaintiff’s case against the agency was one ‘which could not succeed on the current law’.6

Justice Martin ordered that the plaintiff pay the agency’s legal costs on the highest, that is, the indemnity, basis, as he agreed with Carter Newell’s submissions that the claim against the agency was ‘unsustainable’7 and that the plaintiff, properly advised, should have known his claim against the agency had no chance of success.

In making this determination, Justice Martin had regard to the fact that Carter Newell had made an offer to the plaintiff on 2 February 2015, 14 days before the trial commenced on 16 February 2015, for the plaintiff to discontinue his claim against the agency, to indemnify the agency for the contribution claim made by the council against it, and for each party to bear their own costs. That offer was rejected by the plaintiff, with the full knowledge of the adverse costs consequences which would follow if his claim was unsuccessful.

The plaintiff’s claim against the council was also dismissed.

Justice Martin accepted the council’s evidence and held that ‘there was nothing on the headland that suggested that the steps or any other entry to the beach could be found by walking through the bush area…there was no path.’8

Further, His Honour held that ‘a person wishing to get to the beach could have easily found the steps, at night, because the directional sign was illuminated.’9

It was held that the council had no obligation to erect warning signs to prevent people entering the bush on the headland.

Justice Martin cited the provisions of the Civil Liability Act 2003 (Qld) regarding the existence of an ‘obvious risk’,10 and concluded that the plaintiff’s conduct, that is, walking through thick bushland in an area about which he knew nothing, which area became steeper as he approached the top of the cliff, at night, whilst intoxicated, constituted an obvious risk, and any reasonable person, in the position of the plaintiff, should have known that.

As for the plaintiff’s level of intoxication at the time of the incident, expert evidence was given at trial that his blood alcohol content, based on his self-confessed consumption of eight beers over a matter of about five hours, would have been within range of .054 -.065.11 Justice Martin concluded that the plaintiff’s intoxication was a significant factor in his fall and that, had he found in favour of the plaintiff, he would have reduced any award of damages by 50%, referring to the contributory negligence provision12 of the Civil Liability Act 2003 (Qld).

Conclusion

It was Carter Newell’s assessment from the outset that the claim against the agency was hopeless and it should not have been pursued by the plaintiff’s lawyers. This assessment was endorsed by Justice Martin, who concluded that an award of indemnity costs against the unsuccessful plaintiff was justified.

Carter Newell corresponded with the plaintiff’s solicitors on many occasions throughout the course of the action – the first letter was sent in October 2011 - pointing out the unsustainability of the plaintiff’s claim and demanding that the claim against the agency be withdrawn, all to no avail.

This judgement serves as a warning to plaintiff lawyers, especially those engaged in prosecuting dubious claims on a speculative basis, that such claims will be decided in accordance with well established legal principles, and not on the basis of any sympathy which might be extended to a severely injured plaintiff.

1 The judge found that the quality of the light from the street light adjacent to the stairs was such that a person could have read a newspaper by it.
2 The plaintiff conceded he had consumed four mid strength beers and four coronas over the course of about five hours.
3 Morris v Redland City Council & Anor [2015] QSC 135 [70].
4 Ibid [12].
5 Ibid [21].
6 Morris v Redland City Council & Anor [2015] QSC 135 [70].
7 Ibid [71].
8 Ibid [40].
9 Ibid.
10 Ibid [52]; Civil Liability Act 2003 (Qld) s 15.
11 Ibid [62].
12 Civil Liability Act 2003 (Qld) s 47.
Case Note

*Propell National Valuers (WA) Pty Ltd v Australian Executor Trustees Limited* [2012] FCAFC 31

This appeal before the Full Federal Court not only highlights the obligations of valuers, but also confirms the long established principle that post-valuation comparable sales are inadmissible.
Background

Propell National Valuers (WA) Pty Ltd (first appellant) carried on business as a valuer in Western Australia. Mr Travis Coleman (second appellant) was employed by the appellant as a licensed valuer.

In April 2007, Seiza Mortgage Company Pty Ltd (second respondent) received a mortgage application from a customer, Mr Michael Pell. The loan application was made for the purpose of refinancing a residential property (property) owned by Mr Pell. The loan application included a copy of a valuation which had been issued by the first appellant and signed by the second appellant.

At the request of the second respondent, the appellant instructed the second appellant to prepare a further valuation report. The valuation report contained a representation that the market value of the property was $1.6 million. The evidence tendered at trial established that the market value of the property was only $1,030,500 at that time.

The loan application was accepted in reliance upon the valuation report and a loan of $1.2 million was advanced to Mr Pell by Australian Executor Trustees Limited (the first respondent), secured by way of a first registered mortgage over the property.

Mr Pell subsequently defaulted on the loan and was eventually declared bankrupt. The first respondent exercised its rights as mortgagee in possession and sold the property for $980,000.

The respondents sued the appellants for negligence and misleading and deceptive conduct under section 52 of the Trade Practices Act 1974 (Cth) (TPA) (which was in force at the relevant time).

The appeal to the Full Federal Court

The primary issues for consideration on appeal were whether the appellants’ valuation was misleading or deceptive and/or arrived at negligently and also whether post-valuation comparable sales could be used to determine whether a valuation amount was correct.

In the leading decision of the majority, Justice Collier concluded that it was undisputed that the appellants owed the respondents a duty of care in circumstances where they knew who the valuation was being prepared for and that it would be used for mortgage security purposes.

Further, Her Honour held that subsequent sales could not be taken into account in order to determine whether a valuation was correct. She stated that when considering whether a valuer had acted negligently or acted in breach of s 52, only comparable sales data up until the date of the valuation was relevant. She therefore concluded that any post-valuation comparable sales were irrelevant and inadmissible.

She also observed that in circumstances where a valuation might fall within a bracket of 10-15% of the market value, the fact that the valuation fell within that bracket did not in itself preclude a finding that it had been arrived at negligently.

Accordingly, it was held that none of the appellants’ grounds of appeal were substantiated and the appeal was dismissed.

This decision provides a reminder of the obligations placed upon valuers to exercise reasonable skill and care in undertaking valuations and also the requirement to only consider comparable sales which have taken place prior to the date of valuation.
The Australian Government, on behalf of the Commonwealth, state and territory environmental ministers published the National Review of Environmental Regulation Interim Report (report) in March 2015. The report details the current and proposed reform efforts of the states and territories.

The purpose of the report is to identify unworkable, contradictory or incompatible regulation, and identify opportunities to harmonise and simplify the existing regulatory framework. There are significant time and cost savings that could be achieved by the successful implementation of simplified environmental policies.¹

The report focuses on four key areas of reform.

Risk-based regulation and proportionate interventions

This strategy involves regulation commensurate with the level of risk associated with a particular activity. Where an activity poses little risk to the environment, it may not require any monitoring or reporting. These policies are also intended to provide an incentive for businesses to develop environmentally friendly practices so as to avoid any unnecessary and costly regulation.

Harmonisation and removal of duplication

Perhaps the most comprehensive and persistent effort to harmonise environmental regulation comes from the Australian Government’s ‘One Stop Shop’ policy which aims to eliminate, where possible, the requirement to get environmental approvals from both state and federal levels of government. Federal Environmental Minister, the Honourable Greg Hunt, believes that removing regulatory duplication between jurisdictions will save business over $420 million in compliance costs per year.²

Currently, the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) allows for bilateral agreements to be made between the Commonwealth and the states which accredits the state’s processes for approving environmentally sensitive projects and disposes of the need for Commonwealth approval.

A number of bilateral agreements currently operate...
in all jurisdictions with the exception of the Northern Territory and Victoria. Bilateral agreements can cover a wide range of subject matters. There is however, no current power for the Minister to make bilateral agreements pertaining to approval processes for coal seam gas developments and large coal mining developments that would significantly impact water resources.

**Strategic and landscape scale approaches**

Strategic and landscape scale assessments are review processes that consider a number of potential developments over a large area or region at once. Strategic and landscape scale approaches promote efficiency by allowing the cumulative impacts from multiple development proposals to be considered together.

The report suggests that the availability of strategic environmental assessments has potential time and resource cost savings for those businesses which choose to utilise strategic assessments, rather than completing their own individual project assessments.

A further proposed benefit to these approaches is the commercial certainty afforded from knowing which developments are permissible in particular strategic assessment areas.

**Market based instruments and other innovative approaches**

Market based instruments draw upon economic market principles and can be used to drive behavioural change to achieve environmental outcomes.

The report notes that the NSW Government is currently reviewing a scheme which provides financial incentives for businesses to go beyond simply complying with licence conditions, and seeks to encourage the adoption of the best pollution reducing practices.

A number of the other state and territory governments are moving towards commercial and market-based incentives to promote biodiversity conservation and sustainability.

**Will it work?**

Harmonising environmental regulation is of importance to businesses operating within the environmental landscape. Although the expansion of the government’s ‘One Stop Shop’ policy may have the potential to save businesses time and money, the requisite support from the other political parties is lacking, and may ultimately cripple the initiative moving further forward.

Moving away from complex, convoluted and costly environmental regulation and towards an efficient streamlined model provides a positive climate for foreign investment, and will likely encourage productive developments.

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2 Ibid.
5 Ibid.
6 16 June 2014.
7 Ibid 45.
8 Ibid 61.
9 Ibid 62.
Case Note

Simpson & Ors v Jackson [2014] QSC 191

This Supreme Court decision serves as a timely to real estate agents, and buyers and sellers of property, of the need to strictly adhere to the precise terms and conditions of sale and purchase contracts.

Background

The buyers, Mr and Mrs Simpson, entered into a contract to purchase a property at Newport on 23 November 2013. Steps were taken under the contract, including the payment of deposits.

The contract was a standard REIQ residential sales contract and contained the usual clauses in relation to building and pest inspections. Pursuant to clause 4.1 of the contract, the contract was conditional upon the buyers obtaining a written building report from a building inspector and a written pest report.

Clause 4.2 provided that the buyers must give notice to the seller that:

(a) a satisfactory Inspector’s report under clause 4.1 has not been obtained by the Inspection Date and the Buyer terminates this contract. The Buyer must act reasonably; or

(b) clause 4.1 has been either satisfied or waived by the Buyer.

Clause 4.3 stated:

‘If the Buyer terminates this contract and the Seller asks the Buyer for a copy of the building and pest reports, the Buyer must give a copy of each report to the Seller without delay.’

Significantly, clauses 4.4 and 4.5 stated:

4.4 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 4.2 by 5pm on the Inspection Date. This is the Seller’s only remedy for the Buyer’s failure to give notice.

4.5 The Seller’s right under clause 4.4 is subject to the Buyer’s continuing right to give written notice to the Seller of satisfaction, termination or waiver, pursuant to clause 4.2.’

Clause 10.4 related to notices. Clause 10.4 (1) stated that notices be given in writing and that the notices may be given by a party’s solicitor. Clause 10.4 (2) stated that notices are effectively given if they are delivered or posted to the other party or its solicitor or sent to the facsimile number of the other party or its solicitor.
Clause 10.4 (4) stipulated that notices sent by facsimile would be treated as given when the sender obtained a clear transmission report. Clause 10.4 (5) stated:

‘Notices given after 5pm will be treated as given on the next Business Day.’

‘Business Day’ was defined in clause 1.1(f) as meaning ‘a week day other than a public holiday in the Place for Settlement.’

In this instance, the inspection date pursuant to the contract was 9 December 2013. Accordingly, the seller acquired a right to terminate the contract under clause 4.4 if the inspection satisfaction notice provided for in clause 4.2 was not given by 5.00pm on 9 December 2013.

It appears that the buyers’ solicitor sent an inspection satisfaction notice by facsimile to the real estate agent at 4:57pm on the inspection date, advising that the buyers had obtained satisfactory building and pest inspection reports and confirming that the building and pest inspection condition had been satisfied.

However, at approximately 5:07pm the seller’s solicitor, not having received any notice from the buyers (because it had been sent to the real estate agent), sent the buyers’ solicitor a notice terminating the contract. The termination notice stated:

‘We note that the buyer has not given notice in accordance with clause 4.2 of the contract. Accordingly, we are instructed that the seller terminates the contract pursuant to clause 4.4 of the contract.’

The buyers’ solicitor immediately responded by providing the seller’s solicitor with a copy of the inspection satisfaction notice that had been sent to the real estate agent at 4:57pm which stated that the buyers were satisfied with the building and pest inspections, together with a copy of the notice of termination upon which was written ‘see attached page sent to agent at 4.57 today’.

However, the seller’s solicitor maintained that the contract had been validly terminated and the seller refused to complete the sale. The buyers therefore issued an application seeking specific performance of the contract and other relief. In turn, the seller contended that the contract had been terminated and sought a declaration that the contract had been validly terminated and an order that a caveat placed over the property by the buyers be removed.

The court’s decision

In the Supreme Court, rather than asserting that the 4:57pm inspection satisfaction notice was effective, the buyers tried to rely upon the second notice given by their solicitor in response to the seller’s 5:07pm notice of termination. The buyers argued that clause 10.4(5) deemed both notices to have been given simultaneously at midnight on 9 December 2013, or at least at some other simultaneous time the next day; that is, 10 December 2013.

Applegarth J rejected that argument. He noted that it would not make sense for notices received after 5pm to be treated as having been given and received at the same time. He stated that clause 10.4(5) said no more than any notices given after 5pm are to be treated as being given on the next business day. He said that the clause did not state that they are taken to be given simultaneously or in some different order to the order in which they were, in fact, given.

The Court therefore concluded that the notice of termination was effective. In those circumstances, the buyers did not have an entitlement to specific performance or the damages sought. Applegarth J concluded that the seller was entitled to the relief sought in the counterclaim, being a declaration that the contract had been validly terminated and an order that the buyers’ caveat over the property be removed.

Conclusion

It is clear that the buyers (and their solicitor) made two critical mistakes in this case. The first mistake was to leave it until three minutes before the 5.00pm deadline to send the required inspection satisfaction notice. The second mistake was to not pay sufficient attention to the precise terms of the contract which set out who the notice was to be sent to. If the buyers had sent the notice to the seller or to the seller’s solicitor, the sale would still have proceeded.
Johanna Kennerley

Senior Associate

Johanna is a Senior Associate in Carter Newell’s Resources and Commercial Property teams, specialising in planning and environment law.

She provides environment law services for the entire life cycle of resources, construction, extractive industries and other industrial projects including initial project approvals, compliance and incident management. Johanna also has a particular focus on the ‘end of life’ rehabilitation and decommissioning obligations of resources and extractive industry projects. She also regularly advises clients on Queensland’s planning regime, including representing clients in the Planning and Environment Court.

Johanna also undertakes real property work in the resources and extractive industry sector.

Johanna is an active member of the Queensland Environmental Law Association, and is currently serving on the sub-committee arranging the periodic seminars. Johanna is also currently completing her Master of Laws, specialising in Natural Resources and Environment Law at QUT.

+61 7 3000 8308
0402 446 284
+61 7 3000 8466
jkennerley@carternewell.com
Introduction

Over the last 10 years or so, the use of Option Agreements (Options) in property development transactions have become increasingly popular, to the extent that they are now very much one of the suite of documents regularly used in property transactions.

There is no one-size-fits-all, or ‘standard’ form of option agreement, even though there are core elements required to effectively grant an option. Much of the beneficial flexibility offered by the use of options arises from the fact they are necessarily bespoke, tailored documents.

What are options?

At its most simple formulation in the context of property sale and purchase transactions, an option is the grant by one party (grantor) of an option in favour of another party (grantee) to buy or sell property, or take some other interest in land, such as a lease or an easement.

In the property context, options are merely a form of contract to secure a transaction in the future.

Common uses of Options

Options can be useful to:

- Enable a developer to secure a development site whilst retaining the flexibility to resolve the final purchasing entity and funding;
- Enable the parties to defer the formation of the ultimate sale contract, and thereby defer the associated duty and tax consequences;
- Grant sellers mutual option rights to compel the sale;
- Enable home builders to secure lots for house building packages, and avoid having to fund the upfront acquisition of the land; or
- Enable a developer to progressively secure adjacent sites from different owners so as to accumulate a large development site.

Form of Options

As noted above, there is no prescribed, usual or standard form used to document an option. As the
form of an option is unregulated, the parties are entirely at liberty to negotiate the specific terms.

Options can take one of three forms:

- A ‘put option’ – where, in a property sale context, the seller (as grantee of the option) has the right to ‘put’ the land to the buyer (as grantor) and compel the buyer to buy the land;
- A ‘call option’ – where the buyer (as grantee of the option) has the right to ‘call’ for the land and compel the seller (as grantor) to sell the land;
- A ‘put and call option’ – where mutual options are granted, sometimes simultaneously, or sometimes in succession.

**Essential and common features of Options**

The essential features of options for the sale of real estate include:

- it must be in writing;
- a grantor granting the option;
- a grantee having the benefit of the option;
- Certainty as to the subject matter of the option;
- A period, usually referred to as the ‘option period’, within which the option may be exercised by the grantee;
- Certainty as to the method by which the option is exercised; and
- Effective formation of the contract upon exercise of the option.

Additional features commonly found in options include:

- An option fee, forming the consideration to ‘support’ the option as a contract;
- Alternatively, a type of refundable security deposit;
- A right of nomination held by the grantee, enabling the grantee of the option to nominate another party to exercise the option either in common with, or in place of, the grantee;
- Pre-conditions to enlivening of the option, or exercise of the option, commonly due diligence, development approvals and finance-related conditions; and
• Limitations on dealing with the land pending exercise of the option.

The duty position in Queensland

There is no doubt that the ability to defer the formation of the ultimate sale contract through the use of an option is a key benefit and incentive for their use. Provided any arrangements do not offend the duty avoidance provisions of the Duties Act 2001 (Qld) and the Taxation Administration Act 2001 (Qld), there is nothing improper about the use of options as a legitimate transaction-structuring legal ‘tool’.

Grant of the Option

1. Call Options

A call option is the ‘acquisition of a new right’ and therefore constitutes a dutiable transaction.

The dutiable value of the call option is the higher of the consideration and the unencumbered value of the ‘new right’. The timing for payment of duty on the call option will ordinarily be within 30 days of entry into the option agreement, subject to any ability to defer stamping by reason of sufficiently objective third party conditions, such as finance or development conditions.

2. Put Options

By contrast, put options are not dutiable transactions, as they do not comprise an option to ‘acquire’ dutiable property, only dispose of it, and therefore put options do not constitute a ‘new right’.

Duty on the ultimate sale contract

Duty will be payable on the sale contract formed as the result of the exercise of an option in the usual way as for any other contract. For long term options and when there is a rising property market, it must be remembered that the dutiable value of that sale transaction is the higher of the consideration payable and the unencumbered value at the time of entry into that transaction.

Duty on Assignment of Call Options

Once entered into, a call option comprises dutiable property as an ‘existing right’. Therefore any assignment or transfer of the call option by the grantee will be a dutiable transaction, with the dutiable value once again being the higher of the consideration payable and the unencumbered value of the call option comprising the dutiable property.

Call Options (Options to Buy) and Put Options (Options to Sell)

Key terms and considerations

There are a number of key aspects that each party should consider before entering into a Call Option, Put Option, or a Put and Call Option.

1. Grantee / buyer perspective – Call Option

From the grantee / buyer perspective, that party needs to be willing to to buy the property, so will need to be clear as to:

• Its funding arrangements to complete the purchase;
• Completion of its due diligence investigations of the property; and
• Any requirement for conditions which have to be fulfilled before the exercise of the option, such as obtaining Development Approvals.

Other key considerations from the grantee / buyer’s perspective include:

• Amount, timing and refundability of any option fee, with the consequent duty liability;
• The commencement and expiry of the period within which the option can be exercised and are there any conditions precedent to be satisfied before the option can be exercised;
• Whether the grantee requires the ability to nominate another party – the nominee – to enter into the contract upon exercise of the option;
• The full terms and conditions of the sale contract must be negotiated and included in or annexed to the option;
• Whether the grantee wishes to have any security from the grantor for performance of the option and the sale contract if the option is exercised;
• Whether the option document properly accommodates the grantee’s due diligence investigations of the property if these are not
complete at the time of entry into the option; and

- Whether there is an adequate licence to access the property for site investigations and approval purposes.

2. **Grantor / seller perspective – Call Option or Put and Call Option**

A number of the items of consideration for the grantee above apply equally in reverse for the grantor, where a Call Option has been granted, or where there is also a Put Option granted to the seller.

Some additional key considerations from the grantor / seller’s perspective, where there is a Call Option granted to a buyer include:

- Whether in granting the call option, the grantor has complied with any statutory warnings, disclosures or other formalities under which the entry into the option is treated in the same manner as the property sale contract itself;

- Whether the grantor requires to be granted a put option simultaneously with, or consecutively with, the call option;

- Whether the grantor wishes to give the grantee the right of nomination, and either being satisfied as to the financial capacity of the nominee to complete the contract if formed, or requiring the grantee to guarantee or remain responsible for due performance by any nominee;

- Whether the grantor / seller require security from the grantee for performance of the call option and any resulting contract;

- The degree to which the grantor is willing to be constrained in dealing with the land pending exercise of the option; and

- Being very clear about what events will entitle the grantor to terminate, and thereby be relieved of the call option, and whether or not the option fee is refundable.

Further considerations for a seller where the seller has been granted a Put Option to sell property to a buyer include the following:

- Assessing the financial capacity of the grantor / buyer to complete the sale if the put option is exercised, and ideally having security for that performance;

- Drafting the option agreement so as to support, as far as possible, an action for specific performance if the grantor defaults;

- Considering whether the grantor should have a right of nomination of another party to complete the contract in the place of the grantor, and whether in that instance the grantor should be released; and

- Ensuring all statutory requirements for warnings, disclosures and other formalities are complied with in favour of both the grantor and any nominee so as to minimise the prospect of the sale contract being unenforceable.

**Nominations**

As has been noted above, the ability for the grantee of a call option to nominate one or more other parties – whether or not specifically identified – to enter into the sale contract without triggering a further dutiable transaction, is a key aspect of the usefulness of options.

In Queensland, provided the nomination mechanism is not construed as an assignment of the call option as an existing right, there is nothing to impose further duty on exercising the nomination right.

However, the Queensland duty position around nomination rights in call options is one that may be subject to review on an anti-avoidance basis in the future.

**Conclusion**

Options are very useful tools for effectively structuring property transactions relating to both development sites and established property. However, their bespoke nature and the lack of standard forms of Options can add a layer of complexity which can be off-putting for parties not used to dealing with Options on a regular basis.

At their best, Options can be seen as enabling and facilitative documents to get property transactions done, particularly in more difficult times for the property market. Property investors should develop an awareness of Options as a contracting mechanism to efficiently structure their property transactions.

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1 *Duties Act 2001* (Qld), s 10, Schedule 6, definition ‘existing right’. 
Case Note

Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd [2015] QSC 119

Formation of contracts where no formal contract - can an email chain constitute a contract?

In the Queensland Supreme Court’s recent decision of Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd [2015] QSC 119 (Stellard), an exchange of emails was held to be sufficient to create an enforceable contract between parties that adequately met the requirements of s 59 of the Property Law Act 1974 (Qld) (PLA) which requires a contract for the sale of land to be signed and in writing.

Background

In late 2014, North Queensland Fuel Pty Ltd (seller) appointed Colliers International (agent) to sell the freehold and business components of The Koah Roadhouse, a service station on the Kennedy Highway (service station).

Stellard Pty Ltd and Sharmen Pty Ltd (buyers), through their employee Martin Hurry, negotiated the purchase of the service station (mostly by email) with the agent during October/November 2014.

A draft contract was issued in early November 2014, but had not yet been signed by either party when the agent, sent an email to the buyers stating that the contract was not accepted, and that the seller had entered into a contract for the sale of the service station to another buyer.

The buyers claimed that the emails exchanged between the parties constituted a contract. The seller argued that there was no intention to be legally bound by the exchange and that there was no written agreement to satisfy s 59 of the PLA requiring any contract for the sale of land to be in writing and signed by the party to be charged.

The sequence of events

Following an initial inspection of the property, the parties exchanged a number of emails, those central to the decision being as follows:

1. An email from the agent to the buyers on 30 October 2014 which stated that the seller had indicated it would sign a contract on certain terms which were outlined in the email. The email also included a draft contract in the standard REIQ
Contract Commercial Land and Buildings contract format, with special conditions. One of the special conditions required the buyers’ directors to provide personal guarantees.

2. An email was sent by the buyer to the agent from 31 October 2014 (offer email), which:
   • reiterated the proposed purchase price;
   • confirmed the purchasing entity;
   • stated that the offer was ‘subject to contract and due diligence’; and
   • stated that the buyers looked forward to ‘receiving your client’s confirmation that our offer is accepted as clearly both parties are now going to start incurring significant expenses’.

3. An email was sent by the seller on 31 October 2014, 45 minutes after the offer email, accepting the buyers’ offer (acceptance email), and noting that the offer would ‘be subject to execution of the Contract provided (with agreed amendments) …, minimal due diligence period’.

What happened next

On 3 November 2014, the buyers’ solicitor sent the agent an email attaching a revised draft contract, which, among other things, removed the special condition requiring personal guarantees from the buyers’ directors and inserted a ‘Due Diligence’ condition which allowed the buyer to conduct due diligence enquiries within 40 days of the contract date (and to bring the contract to an end if not satisfied).

On 7 November 2014, the agent communicated that the seller had decided not to accept the contract due to the changes to the proposed conditions and noted that the seller had entered into a contract for the sale of the service station to a different buyer.

Binding contract- buyer’s arguments

The buyer argued that the emails exchanged on the 30th and 31st of October 2014, as informed by the conversations between the agent and the buyers on the same days, constituted a ‘valid and binding agreement’ between the parties.

The seller, however, sought to counter the buyers’ position on the basis that:

1. The ‘offer’ could not be unconditional and capable of unqualified acceptance because it was expressed to be ‘subject to contract’;
2. The ‘acceptance’ in the acceptance email from the agent was not an unqualified acceptance of the terms of the 31st October 2014 email from the buyers;
3. The parties did not reach agreement as to issues material to the proposed transaction, namely:
   • whether the directors of each of the plaintiffs would be required to execute a personal guarantee in the terms proposed by the defendants; and
   • the duration of any due diligence period;
4. The parties did not manifest an intention to become legally bound to a contract and no intention can be inferred ‘where the parties did not progress to the point of execution and exchange’ of a written contract;
5. Even if a contract was found to exist, then there was no writing sufficient to satisfy s 59 of the PLA.

Decision

Did the parties intend to become legally bound?

Both the offer and acceptance emails provided that the offer was subject to execution of a contract.

In the court’s view, the broader context of the offer and acceptance emails and the expressions used in them strongly suggested that the parties ‘were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms’.¹

The court therefore concluded that the words ‘subject to execution of the contract’ were more consistent with the parties having agreed on the essential terms with the intention that they would be formally recorded later.
Was there agreement as to the material terms of the transaction?

The seller argued that there could be no contract because there was no agreement as to the material incidents of the proposed transaction including the personal guarantee and due diligence period.

The court, however, took the view that:

1. Provision of personal guarantees was not a condition precedent to the contract formation given the seller did not indicate that to be the case in any communication. The absence of agreement in relation to that issue did not therefore affect the existence of the contract alleged by the buyers.

2. The due diligence period was agreed as the 40 day period from the contract date nominated by the seller in an email from the agent to the buyers was reflected in the amended contract submitted by the buyers’ solicitors on 3 November.

The court also noted that the parties had agreed on the main terms of the contract, although that agreement was expressed in informal terms, and that each party knew that the other was going to take steps immediately, which was consistent with there being a contract.

The buyers consequently successfully established a binding contract between themselves and the seller.

Were the writing and signing requirements of s 59 of the PLA satisfied?

The seller contended that even if a contract was found to exist, there was insufficient writing to satisfy s 59 of the PLA.

Section 59 of the PLA provides that contracts for the sale of land must be in writing as follows:

‘59 Contracts for sale etc. of land to be in writing
No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action
is brought, or some memorandum or note of the contract, is in writing, and signed by the party to be charged, or by some person by the party lawfully authorized.’

As there was no physical signature on the emails, the buyers sought to rely on the following provision of the Electronic Transactions (Queensland) Act 2001 (ETQ Act).

Section 14 of the ETQ Act provides:

‘14 Requirement for signature

1. If, under a State law, a person’s signature is required, the requirement is taken to have been met for an electronic communication if –

   a. A method is used to identify the person and to indicate the person’s intention in relation to the information communicated; and

   b. The method used was either –

      (i) As reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all circumstances, including any relevant agreement; or

      (ii) Proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and

   c. The person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in paragraph (a).

2. The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.’

The sellers argued that the email did not contain a signature which was supported by s 14 of the ETQ Act.

The court concluded that the requirement in s14(1)(b) and (c) had been established given the identification of the person and the person’s intention could be established by further evidence which was, in this case, the various conversations held prior to 31 October 2014, and the offer and acceptance emails.

The court also noted that in circumstances where parties have engaged in negotiation by email (and particularly when the offer was made by email), then it was open for the court to infer that consent has been given by the conduct of the other party.

The court ultimately found that there was a properly constituted agreement and gave judgment in favour of the buyers.

Conclusion

The reasoning applied in Stellard underlines the existing and long held position in contractual law – to establish whether agreement has been reached, it is essential to objectively look at the substance of what has been agreed in light of all the evidence, not just the form.

Stellard’s importance, however, lies in the conclusions reached in respect of s 59 of the PLA, in particular for the contract to be ‘in writing’ and ‘signed’, particularly in light of the ETQ Act. Those conclusions clarify that email exchange will qualify as ‘writing’, and the ‘signing’ requirement could be met where the requirements of s 14 of the ETQ Act are fulfilled. Those conclusions mean that contracts for the sale of land do not have to be in writing or signed in the literal sense to be binding on the parties, if the parties evidence an intention to be bound by their communications and/or actions in respect of that sale.

This decision demonstrates how important it is for parties engaging in contractual property negotiations to ensure that any communications between them are consistent with their intention. If a party does not intend to be bound until a formal written agreement is entered into, this should be made clear in writing. Parties should also subsequently ensure that any written or email communication and their actions are consistent with the stance they take throughout the course of negotiations — a blanket statement that parties’ agreement is ‘subject to contract’, will not on its own necessarily mean that a binding contract has not been formed.

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1 Sinclair, Scott & Co Ltd v Baulkham Hills Private Hospital Pty Ltd (1929) 43 CLR 310 at 317.
Case Note

Sunshine Coast Regional Council v Parklands Blue Metal Pty Ltd [2015] QCA 91

The Court of Appeal confirmed that the Parkland Blue Metal quarry can proceed because of the future need for quarrying products in the local and wider area, and also confirmed that the need for the development must be determined from the perspective of the community as a whole, and not just particular members of it.

Background

In early 2009 Parklands Blue Metal Pty Ltd (Parklands) made a Development Application to the Sunshine Coast Regional Council (council) for a hard rock quarry in Yandina on the Sunshine Coast. The Development Application made to the council was impact assessable and attracted significant attention, with 4979 submissions made against the project.

The proposed quarry had an output projection of 350,000 tonnes per year and had specific hours of permitted operation. An access road was to be constructed for quarry traffic. The proposed quarry excavation would be limited to an area of 27 hectares. There were estimated reserves of 17-20 million tonnes.

The council refused the initial development application in October 2011. Parklands then commenced proceedings in the Queensland Planning and Environment Court before Robertson DCJ regarding the council’s decision to reject a development application for a proposed quarry.

Decision at first instance

The court was required to assess the application by standing in the shoes of the assessment manager and applying on the laws and policies applying to at the time the development application was made.

Relevant to the court’s decision was the Maroochy Plan 2000 (Maroochy Plan), which was in force at the time of the Development Application. The Maroochy Plan, as well as previous planning controls over the past 30 years, had dedicated the land the subject of the application to extractive industry. The site is also part of a key resource area (KRA) for the provision of construction aggregates to the Sunshine Coast community.

Parklands was successful in the first instance, with Robertson DCJ approving the Development Application, subject to the formation of appropriate conditions.

The council then sought leave to appeal Robertson
DJC’s decision to the Queensland Court of Appeal on a number of grounds, as set out below.

Decision of the Court of Appeal

The Court of Appeal ultimately rejected the council’s request for leave to appeal, finding that the council had not demonstrated any error of law on the part of the primary judge. Council was also required to pay Parkland’s costs.

Each of the council’s grounds for appeal, along with the reasoning of the Court of Appeal are set out below.

Non-compliance with the Planning Scheme

The council argued that the Primary Judge erred in his construction of the planning instruments.

The Court of Appeal rejected this point, stating that Robertson DCJ provided a comprehensive decision having due regard to the relevant legislative framework and planning provisions. Furthermore, the court stated that Robertson DCJ provided due consideration to planning concepts, including the balance of environmental amenity against the community need for extracted industry on the site. This was a key consideration throughout the Court of Appeal’s judgment.

Late

The council had raised various issues with the Development Application only weeks prior to the primary hearing, including, significantly, matters relating to the potential for interference with the current operations and future expansions of a local airport. The primary judgment was disapproving the council’s behavior in bring such issues to light so late in the proceedings.

The council sought to argue that the primary judge erred in referring to the council’s behavior of raising issues at a late stage. The council argued that, as his Honour’s decision must be unfettered by the council’s original decision, it was irrelevant that some issues were raised for the first time in the appeal.

The Court of Appeal held that Robertson DCJ was entitled to consider the council as a model litigant and to expect the council to identify real issues during the early stages of the Development Application process. However the Court of Appeal’s judgment was careful to confirm that the Primary Judge’s comments made regarding the poor behavior of the council did ‘not play a part’ in his decision to approve the Development Application.

Evidence of quarry expert

The primary judge treated evidence given by council’s quarry expert (who opposed the development) unfavourably once it was known to the court that the expert was a paid consultant to another proposed quarry development that was not yet approved. Robertson DCJ was scathing of the expert’s evidence and council’s reliance on such evidence, stating that the report (which also purported to deal with issues outside of the expert’s expertise) impermissibly descended into advocacy.

The Court of Appeal supported Robertson DCJ’s finding, confirming that Robertson DCJ was entitled to find the expert’s opinion was tainted by his role as a consultant to the developer of a competing quarry.

Aviation safety

The Court of Appeal rejected council’s contention that Robertson DCJ erred in his assessment that the joint aviation expert report provided an acceptable level of aviation safety.

The Court of Appeal confirmed that the Primary Judge had carefully considered the expert evidence contained in the aviation expert report and made a decision to leave the limits of the exclusion zone to aviation authorities. Furthermore, the court concurred with Robertson’s DCJ determination that having regard to the Aviation Safety Planning Policy and the relevant code, provided the quarry activities were conducted under appropriate imposed conditions, blasting operations could occur within acceptable safety limits.

Haul route – maintenance agreement

The council contended that the primary judge ought to have refused the application until a road maintenance agreement was entered into. The Court of Appeal reiterated and agreed with the primary judge’s decision that the road maintenance agreement should be decided at the conditions stage of the Development Application.

Assessment of Blasting Impacts

The Court of Appeal rejected the council’s argument that the Primary Judge did not provide a proper
assessment of the blasting impacts. The Court of Appeal held that Robertson DCJ had provided relevant consideration to the expert evidence and guidelines regarding aircraft safety, such as the imposition of timing constraints for blasting within the airspace.

Evidence of blasting experts

The council sought to argue that Robertson DCJ erred in assessing the blasting impacts, and specifically, that he failed to provide adequate reasons and that the expert’s evidence was not adequately considered.

The Court of Appeal held that Robertson DCJ had provided adequate reasons for not accepting the evidence of the council’s expert, Mr Huntley, whose evidence was not seen favourably by the court given his association with a competing quarry development application.

Future need

The Primary Judge stated that the issue of need was an ‘important primary issue … because the assessment process requires an objective balancing of the maintenance of a high standard of amenity in what is a pleasant rural valley overlooked by pockets of residential development, against community need for extractive material’.

The Primary Judge also considered the application of recent case law to other factual situations, stating that the balancing exercise is a relative concept that must be considered in light of the facts and circumstances of each case.

Robertson DCJ also provided that future need is to be determined from a community perspective, and not that of the appellant or even the objectors, noting that ‘a community consists of more than just particular members of it’.

The council contended that the primary judge erred in his findings that there was a future need for the quarry. The Court of Appeal confirmed Robertson DCJ’s finding, noting that the experts agreed that there was a future demand in the property and construction sectors of the region – only differing on the extent of such demand. The Court of Appeal also concurred with the views regarding the assessment of need adopted by the Primary Judge.

Conclusion

Ultimately, the council’s appeal failed on all points and the Court of Appeal upheld the decision of the Planning and Environment Court. The council was also ordered to pay the costs of Parklands Blue.
Case Note

Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd [2015] WASCA 21

Where a tenant and landlord were held to have entered into a binding agreement for a new lease and licence on terms concluded by an exchange of emails between the parties, although a signed formal lease and licence had not been signed by them.

Background

The lease

Priolo Corporation Pty Ltd (Priolo) and Vantage Systems Pty Ltd (Vantage) were parties (lessor and lessee respectively) to a lease of a floor of an office building (Property) in West Perth. Under the lease, a licence was granted to Vantage to use six car parking bays on the Property. Vantage sublet part of the Property to Deugro Projects (Australia) Pty Ltd (Deugro). Priolo commissioned Savills (WA) Pty Ltd (Savills) to act as their property manager and agent.

The proposal

Before the lease expired, Savills and a representative from Vantage, Mr Walker, exchanged correspondence about entering into a new lease for the premise and licence for the car parking bays. The initial lease offer was not accepted by Mr Walker. Savills’ representative then presented a revised lease proposal (revised proposal) to Mr Walker, requesting he confirm whether the proposal was acceptable to Vantage, so it could then proceed to instruct Priolo’s solicitors to prepare the draft lease and licence documents. The revised proposal contained a material error, stating the licence fee for the six car parking bays was $375 per bay per annum instead of $375 per bay per month.

On 10 June 2009, Mr Walker emailed Savills’ representative, confirming that Vantage and their sub-tenant, Deugro, were satisfied with the terms of the revised proposal. This exchange formed the basis of Priolo’s case that the revised proposal and Mr Walker’s email of 10 June 2009 constituted an agreement to lease.

The formal lease

Savills instructed Priolo’s solicitors to prepare the draft lease and licence agreements. Savills identified the error of the licence fee and instructed Priolo’s solicitors to correct the error. On 2 July 2009, Savills sent the agreement with amendments to the licence to Mr
Walker and requested that he review and confirm that the documents were in order. In September 2009, Mr Walker replied to Priolo, stating that their sub-tenant Deugro disagreed with the 'make good' clause and wished to amend the clause. Priolo maintained that they were not willing to accept Vantage’s alternate 'make good' clause.

**Sub-lease termination**

On 30 September 2009, Deugro purported to terminate its sub-lease with Vantage. Vantage then proceeded to inform Priolo that there was no concluded agreement to the lease and it intended to vacate the Property.

**Issue**

On appeal, the Western Australian Court of Appeal was charged with determining whether the revised proposal and Mr Walker’s emails of 10 June 2009 constituted an agreement to lease. The trial judge had previously concluded that the parties intended to enter into a binding agreement by acceptance of the revised proposal from Vantage.

**Submission by Vantage**

Vantage submitted that the parties’ inability to agree on the ‘make good’ provision (an important term of the contract) in the draft lease prepared by Priolo’s solicitors and material error in the licence agreement meant that no binding agreement for lease had been reached.
Subjective intentions

The court held that evidence of the parties concerning their construction of the provisions of the revised proposal and evidence of uncommunicated subjective views was not relevant to determining whether Vantage accepted the revised proposal.

Decision

The Court of Appeal dismissed the appeal.

Buss JA provided the leading judgment from the Court of Appeal. The fundamental issue for determination was whether Priolo and Vantage had intended to enter into a binding agreement, despite Vantage refusing to sign the lease document.

Intention

The Court of Appeal emphasised that the relevant intention was the intention to contract and stated that when determining whether that intention existed, attention should be given to the subject matter of the agreement, the relationship the parties had to each other and other surrounding circumstances.

The court held that under an objective assessment, the parties were willing to, and did bind themselves to a new lease of the Property, and a new licence on the terms in the revised proposal, on the basis that the revised proposal was eventually to be superseded by the formal lease and licence agreement. The court also held that subsequent negotiations and communications between the parties did not void that concluded agreement.

The court provided the following observations, for its decision:

1. When Vantage accepted the revised proposal, it had occupied the property since 1 July 2003 and was familiar with the premises and its suitability for its business activities. In addition, the parties had a history and familiarity with each others’ representatives which meant that they were consequently able to make a decision concerning Vantage’s reliability and trustworthiness;

2. Deugro had informed Vantage that it approved the terms of the revised proposal before Vantage accepted the revised proposal;

3. The revised proposal had all of the terms that were necessary to form a legally binding contract and did not involve the parties accepting any provisions which were materially more onerous or materially less advantageous from a legal or commercial perspective than those in the lease;

4. The term of the new lease was identical to the duration of both the initial term and the renewed term of the lease;

5. The failure of the parties to agree on the ‘make good’ clause meant that the parties were bound by the express term included in the revised proposal with respect to Vantage’s obligation to reinstate;

6. On a proper construction of the revised proposal, the provisions were to be a guide for the purposes of the parties’ negotiations; and

7. The fact that subsequent negotiations between the parties may not culminate in the execution of formal lease and licence agreements did not affect the binding and enforceable character of the agreement made when Vantage accepted the revised proposal.

The Court of Appeal also refused to overturn the trial Judge’s finding that the Priolo should be permitted to rectify the revised lease proposal (the subject of the binding agreement) to correct the error regarding the car park licence fee, on the basis that it would be unconscionable for Vantage to rely on the obvious mistake.

Conclusion

This decision demonstrates the importance of communications made during the negotiation stage of lease transactions. It provides a stark reminder to businesses that communications between parties should be carefully considered to ensure they do not bind parties to obligations and agreements unless they intend for that to occur. Businesses should therefore be careful to ensure that communications are appropriately worded, to ensure communications prior to the execution of formal agreements do not inadvertently create binding obligations on parties.
Brett Heath, Special Counsel  
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