Parties legally bound to unsigned put and call option

The point at which the parties to a negotiation for the sale of land are legally bound can often be difficult to judge. This is particularly so where the parties have agreed a lawyer is to formalise the agreement between them. When the parties have not agreed all matters relating to the transaction, interesting questions arise as to what terms regulate the relationship. In *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60 the Queensland Court of Appeal considered first, whether there was a binding agreement to sell and secondly, how the relationship would be regulated in the absence of express agreement in relation to many of the terms.

Facts

Hebron Park was the registered proprietor of a parcel of 20 acres of rural residential land on the Queensland Sunshine Coast. In July 2007, Moffatt a property developer first became interested in purchasing the land when the matter was raised with it by an agent acting on behalf of Hebron Park. These initial negotiations were disbanded when Hebron Park began negotiations with another interested purchaser. Negotiations with the second potential buyer were not successful and in March 2008, the agent of Hebron Park again contacted Moffatt which was still interested in buying the land.

On 4 April 2008, Moffatt forwarded a letter to Hebron Park's agent outlining its terms. This offer was not accepted but negotiations continued. On 8 April another letter with revised terms was forwarded by Moffatt to Hebron Park's agent, containing the ACN of Moffatt and details of the proposal. The letter clearly identified the land and purchase price, confirmed Moffatt would pay a non-refundable deposit on signing the contract and described the settlement date as 12 months from the date of contract. The letter also confirmed the offer was in the form of a put and call option and that Moffatt required security in the form of a caveat or mortgage over the land. The offer was described as unconditional and a final offer and required Hebron Park to sign the letter if it accepted the offer. The letter provided that "[i]f the vender accepts this offer… we will instruct our Lawyer to prepare the contract documentation." The offer contained in this letter was accepted on behalf of Hebron Park by an express statement to that effect and the signature of its director.

Subsequently, Hebron Park asked the agent whether Moffatt would "let the deal go" upon payment of costs incurred. Moffatt would not do so and sought specific performance of the contract. The trial judge decided there was a binding agreement and ordered specific performance of it.

Hebron Park appealed the decision and argued that the letter of 8 April was not intended to constitute a legally binding agreement. Amongst other things, it argued that the there could be no intention to be bound in circumstances where the formalities required by the *Property Agents and Motor Dealers Act 2000* (Qld) ("the PAMDA") were not complied with. Hebron Park's second argument was that even if there was an intention to be bound, the terms were not

sufficiently certain. Third, it argued that the agreement was not enforceable because there was no sufficient note or memorandum to satisfy s 59 of the *Property Law Act 1974* (Qld). The Court of Appeal unanimously decided Hebron Park's appeal should be dismissed.

Intention to be bound

As the parties had agreed that a formal contract should be entered into, argument surrounding whether there was an intention to be legally bound focused on the three categories of cases outlined in the High Court decision in *Masters v Cameron* (1951) 91 CLR 353 at 360-361.

Moffatt argued that the case fell within the second category; that there was a binding contract as the parties had agreed upon all the terms and did not intend to depart from their agreement but had made performance of one or more terms conditional on the signing of a formal contract.

Hebron Park argued that the arrangement here was one falling within the third category; that there was no intention to be bound until a formal contract was signed. It was argued (at [14]) that there could be no concluded agreement in circumstances where the contemplated final contract was the put and call option not the letter of 8 April (at [14]). It was also argued that because the letter provided for payment of the deposit on signing of the formal contract not the letter and also because calculation of the settlement date was by reference to the signing of the formal contract, that there could be no agreement to be bound at this stage (at [14]). Further argument was put that in circumstances where the sale relates to land there is something akin to a presumption of fact that there is no intention to be bound until the formal contract is signed (at [15]) and that the trial judge had erred in not relying on the decision of *Marek v Australian Conference Association Pty Ltd* [1994] 2 Qd R 521 in resolving this issue (at [17]).

In *Marek*, the court suggested that where there is an expectation the usual REIQ contract is to be executed, then there will be a strong inference there is no intention to be bound until that contract is executed. Also, where solicitors are involved, it is less likely the parties intend to be bound until the formal contract is signed. The suggestion is that it is a rare case where the parties will be bound before the formal contract for the sale of land is signed (at [15]).

The Court of Appeal found any argument by Hebron Park that the trial judge had erred in "failing to appreciate that he was bound by the authority of *Marek* to regard a putative agreement for the sale of land which contemplates the execution of a formal contract as presumptively within the third category of contracts discussed in *Masters v Cameron"* was without consequence (at [19]). The Court of Appeal distinguished *Marek* as on the facts before it, the parties were not negotiating through lawyers, there was no obvious contemplation of the use of a standard form REIQ contract and no evidence the terms of the option were to be the subject of any further negotiation between the parties (at [24]).

The Court of Appeal referred to *S J Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87 and *Teviot Downs Estate Pty Ltd & Anor v MTAA Superannuation Fund (Flagstone Creek and Spring Mountain Park) Property Pty Ltd* [2004] QCA 57, and confirmed that "there is a strong traditional expectation that in the negotiation of sales of land the parties do not intend to be bound until a formal contract is executed". However, whether there is such an expectation so

that the parties can be said to be negotiating in accordance with a traditional or common practice is a matter to be determined on the facts of the particular case (at [22]).

While accepting there is a strong traditional expectation in negotiating land sales, the court referred (at [22]) to the statement of McHugh JA (with whom Kirby P and Glass JA agreed) in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634-635 which the court confirmed was accepted as correct in *Teviot Downs* that:

> The decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in light of the surrounding circumstances: *Godecke v Kirwan* (1973) 129 CLR 629 at 638: *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 332-334,337. If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction.

This approach is consistent with the decision of the High Court in *Niesmann v Collingridge* (1921) 29 CLR177 which the trial judge and Court of Appeal found similar to the facts of the case before them (at [25]). Any argument by Hebron Park that the case did not fit neatly within the second of the *Masters v Cameron* categories was rejected by the court. The court confirmed strict categorisation was a fruitless exercise as the assessment was simply one of the objective intention of the parties (at [38]).

In assessing the intention of the parties the Court of Appeal found that:

(i) the director of Hebron Park accepted the 'unconditional offer' without reservation and a binding agreement was formed immediately. As a result of the form of words used, there was an unequivocal expression of intention to enter a binding contract (at [26]).

(ii) the parties actions could be viewed in light of the negotiations which had been aborted by Hebron Park in 2007. It was possible to conclude that given that 12 months had elapsed both parties were concerned to reach a commitment and bring the negotiations to a close (at [27]).

(iii) There was no evidence this was a case where further negotiation was essential and the parties clearly contemplated co-operating to implement the agreement by the signing of the further contract (at [30]). An absence of agreement on many matters may point to a lack of intention to be bound, but that was not the case here. While the precise dates for payment of the deposit and settlement arrangements and the terms of the option were not included in the letter of 8 April, there was an obligation implied into the contract to co-operate to ensure the other party obtained the benefit of the contract (at [34]). The argument put forward that the need to draft the put and call option would require further negotiation and agreement was rejected. The lawyer for Moffatt had authority to include terms which were "reasonable and relevant to the Put and Call contemplated by the letter of 8 April 2008" and any disputes could be adjudicated by the court" (at [36]).

(iv) The court confirmed (at [33]) that "there [was] a clear indication that the exercise to be devolved upon Moffatt's lawyer was a drafting exercise intended to facilitate the

mechanical aspects involved in the completion of the transaction to which the parties had made a binding commitment".

Property Agents and Motor Dealers Act

The court briefly considered the impact of PAMDA on the transaction, a matter not explored at the trial. The court confirmed that a failure to comply with PAMDA did not provide a basis for concluding there was no intention on the part of the parties to enter a binding agreement under the common law, but the consequences of a failure to comply with the legislation was that the purchaser had a right to terminate the contract (at [39]).

The court provided some insight to their future construction of PAMDA by stating that "this is not a case of the kind spoken of in the relevant provisions of PAMDA where the contract is 'given to the buyer by the seller'. This is not a case of a sale of a residence to a consumer but of an acquisition of stock by a developer" (at [40]).

There are several points that can be made about this statement. First the statement highlights that where a buyer prepares and sends a proposed contract to the seller for execution there is no requirement for the seller to comply with s 366 – s366B of PAMDA. Second, where no proposed contract is prepared but correspondence contains terms negotiated between the parties, there is no requirement to comply with s 366 – s 366B. Presumably the underlying rationale is that the parties will need to comply when the proposed contract is drafted and sent to the buyer for execution. Third, the view that PAMDA does not apply to contracts between developers and sellers is of concern. The primary requirement for the operation of the Warning Statement provisions of PAMDA is that the contract concerns a sale of residential land. There is no qualification evident in the legislation that the buyer must be a consumer. The fact there is no distinction in the legislation between a private sale and one to a developer was confirmed by Fryberg J in *Hedley v BCRP* [2008] QSC 261.

Uncertainty or incompleteness of terms

Arguments relating to uncertainty were focused on a failure to identify the consideration for the grant of the option and the particular details surrounding the exercise of the option. The Court of Appeal confirmed that the agreement was certain and that the mechanical details could be "supplied by implied terms and considerations of reasonableness which obviated the need for further express agreement" (at [56]).

On the first point the court confirmed that the mutual exchange of promises constituted sufficient consideration to bind the parties (at [47]). The option was to be exercised by any form of notice (at [48]). Hebron Park's argument that the agreement was uncertain because it did not specify when the option was to be exercised was also rejected. The option had to be exercised within a reasonable time. As the letter made it clear that the conveyance was to take place 12 months from the date of contract, the option had to be exercised in sufficient time to allow this to occur (at [50]).

The argument by Hebron Park that there were contradictory provisions relating to the deposit also was rejected. This argument arose because the letter of 8 April 2008 provided the deposit

was non refundable and also provided that a mortgage or caveat was to be provided to secure its repayment. It was clear from the correspondence between the parties that the deposit was intended to be non-refundable except in the case where Hebron Park sold the land to a third party (at [52]). The possibility that the security might take the form of a mortgage or caveat did not make the agreement uncertain. The mode of performance was a matter of choice for Hebron Park (at [52]).

The court also found that despite the lack of explanation of the terms relating to the put and call entered into, there was no uncertainty as to what constituted a put and call option which had a well understood meaning. Each party had an unconditional right to require the other to buy or sell the land (at [53]).

Property Law Act

Section 59 of the *Property Law Act* 1974 (Qld) requires a contract for the sale of land or a memorandum or note of the contract to be in writing and signed by the party to be charged or their lawfully authorised agent. Hebron Park argued the letter of 8 April 2008 was insufficient as a memorandum because it did not identify the purchasing entity which it argued, might have been selected by the "Moffatt Group" (at [58]). The letter of 8 April 2008 was written on letterhead styled "Moffatt Property Development Group" and included the ACN of Moffatt Property Development Group Pty Ltd. The court found the purchaser was sufficiently identified.

Comment

This decision highlights that parties in the negotiation phase of a transaction must be particularly mindful of the possibility of being bound well before formal documentation is prepared or signed. The decision makes it clear that the parties do not need to address all issues before a binding agreement arises. The court is prepared to imply obligations to overcome many deficiencies. If the parties do not intend to be bound until formalisation of the contract this should be clearly stated at the commencement of negotiations and in all correspondence.

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