SUPREME COURT OF QUEENSLAND

CITATION:	*V Quattro Pty Ltd v Townsville Pharmacy No 4 Pty Ltd* [2024] QCA 34
PARTIES:	**V QUATTRO PTY LTD** ACN 116 556 837 (appellant) **v** **TOWNSVILLE PHARMACY NO 4 PTY LTD** ACN 611 267 246 (respondent)
FILE NO/S:	Appeal No 7011 of 2023 SC No 100 of 2023
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court of Queensland at Cairns – [2023] QSC 105 (Henry J)
DELIVERED ON:	12 March 2024
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2023
JUDGES:	Mullins P, Bond JA and Kelly J
ORDER:	**The appeal is dismissed, with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the Grantor entered into a written call option agreement with the Grantee – where the call option agreement recited that the option was granted "in consideration of receiving" the premium – where the premium was the sum of $10 – where the call option agreement provided that the premium must be paid to the Grantor "within 2 business days of the date of this Agreement" – where the call option agreement was executed more than 2 business days after the date which it bore – where the Grantee did not pay the premium within the required time period and only paid it just prior to exercising the call option – where the Grantee obtained a declaration from the primary judge that it had validly exercised the option in accordance with the call option agreement – where the promise to pay the premium within the stipulated time was construed as an inessential or innominate term, breach of which could sound in damages at most unless time was made of the essence by the giving of a notice requiring performance of the obligation within a reasonable time

Barba v Gas and Fuel Corporation (Vic) (1976) 136 CLR 120; [1976] HCA 60, cited
Himbleton Pty Ltd v Kumagi (NSW) Pty Ltd (1991) 29 NSWLR 44, cited
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61, applied
Lydia Court Pty Ltd v Panousis (1973) 2 BPR 9178, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, applied
Trollope & Colss Ltd v Atomic Power Constructions Ltd [1963] 1 WLR 333, applied

COUNSEL: M A Jonsson KC, for the appellant
S Kelly and P J Hick for the respondent

SOLICITORS: WGC Lawyers for the appellant
Devenish Law for the respondent

[1] **MULLINS P:** I agree with Bond JA.

[2] **BOND JA:** By a written call option agreement made with the respondent on 27 November 2020 the appellant (**the Grantor**) agreed to grant to the respondent (**the Grantee**) the option to purchase a pharmacy business.

[3] The call option agreement had recited that the Grantor granted the option to the Grantee "in consideration of receiving the Premium" and had provided that the Grantee "must pay the Premium to the Grantor within 2 business days of the date of this Agreement".

[4] "Premium" was defined as "the sum of $10.00".

[5] The Grantee did not pay the $10 premium within the required time period. In fact, it only paid the $10 premium to the Grantor on 12 September 2022 and only shortly before it purported to exercise the call option.

[6] The Grantee obtained a declaration from the primary judge that it had validly exercised the option in accordance with the call option agreement.

[7] The Grantor seeks to overturn that outcome. By its grounds of appeal, it contends the primary judge erred by failing to conclude that strict compliance with the contractual requirement for payment of the $10 premium within the stipulated time limit was essential to:

(a) the enforceability of the call option agreement as a contract; and

(b) the valid lawful and effective exercise of the option to purchase provided for in the call option agreement.

[8] For reasons which follow, I disagree. The appeal should be dismissed, with costs.

Relevant facts

[9] The call option agreement was entirely in writing. At the top of its first page, immediately under the heading "Call Option Agreement", it stated "[t]his agreement is made on the 27th day of November 2020".

[10] It was not executed on that date. Rather the Grantee had executed the document by the application of an electronic signature and the fact that it had done so was notified to the Grantor when the signed option was returned to the Grantor's solicitors by email on 3 December 2020 with a request that it be forwarded to the Grantor for its signature.[1] The Grantor executed the document on 3 December 2020 and the fact that it had done so was communicated to the Grantee by email on 4 December 2020.[2]

[11] The recitals provided:

> "A. The Grantor is the owner of the Business.
>
> B. The Grantor has agreed to grant to the Grantee an option to purchase the Business (the 'Call option').
>
> C. In consideration of receiving the Premium the Grantor agrees to be bound by the terms of this Agreement."

[12] Clause 1 relevantly provided:

> "1. **Interpretation**
>
> 1.1 In this Agreement unless a contrary intention appears:
>
> (1) **Agreement** includes any option arising out of or in connection with this Agreement;
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> …
>
> (3) **Business day** means any day which banks are open in Cairns, Queensland;
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> (4) **Call option** means the option granted under clause 2.1;
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> (5) **Call option expiry date** means 5.00pm on 28th August 2023;
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> (6) **Call option period** means the period commencing on the date of this Agreement and expiring on the Call option expiry date;
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> …
>
> (8) **Notice of exercise of Call option** means a notice of its intention to exercise the Call option given by the Grantee to the Grantor in a manner defined in clause 8;
>
> (9) Premium means the sum of $10.00; …"
>
> …
>
> 1.6 No interest in the Business shall be vested in or transferred to the Grantee pursuant to this Agreement until the Call option has been exercised. The option granted pursuant to this Agreement is to be construed and interpreted as an irrevocable offer made by the Grantor to the Grantee.

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1 Affidavit of Twomey filed 22 February 2023 at [2(c)] and exhibit TNT-3.

2 Affidavit of Loucas filed 17 March 2003 at [3] and [4] and exhibit NL-2.

1.7 Headings are for convenience of reference only and will not affect the construction or interpretation of this Agreement."

[13] Clause 2 provided:

"2. **Condition Precedent**

2.1 This Agreement is subject to and conditional on the Grantee:

(1) entering into the Star Pharmacy Contract within one month from the date of this Agreement; and

(2) completing the purchase of the Star Pharmacy within six months from the date of this Agreement.

2.2 The Grantee must give the Grantor written notice of satisfaction of clauses 2.1(1) and (2) as soon as practicable."

[14] The critical operative terms were those expressed in clauses 3, 4 and 5 as follows:

"3. **Call option**

3.1 In consideration of the payment of the Premium, the Grantor grants to the Grantee [or its permitted assignee] an option to purchase the Business for the Purchase Price and on the terms described in the Contract.

3.2 The Grantee must pay the Premium to the Grantor within 2 Business days of the date of this Agreement.

3.3 The Grantee must in order to exercise the Call option serve the notice of exercise of Call option on the Grantor by 5.00pm on the Call option expiry date or the Call option will expire worthless;

3.4 Upon the exercise of the Call option there will be simultaneously entered into between the Grantor and the Grantee [or the permitted assignee (as the case may be)] an agreement for the sale and purchase of the Business, upon the terms of the Contract (provided that if the Call option is exercised by the assignee then any references in the Contract to the Grantee, are deemed to refer to the assignee subject to the provisions of this Agreement and notwithstanding any inconsistent provision in the Contract).

3.5 Following receipt of the document referred to in clause 3.3 the Grantor and Grantee will, as a matter of convenience and as soon as reasonably practicable execute a document in the form of the Contract but the failure to do so will not affect the validity of this Agreement or the enforceability of the Contract.

3.6 The Call Option may only be exercised during the Call option period.

4. **Premium on non-exercise of option**

4.1 Should the Grantee [or the permitted assignee of the Grantee (as the case may be)] not exercise the Call option, the Premium will be forfeited to the Grantor.

5. **Premium on exercise of option**

5.1 Should the Grantee [or the permitted assignee of the Grantee (as the case may be)] exercise the Call option, the Premium will comprise part of the Purchase Price payable under the Contract."

[15] Termination for default clauses were expressed in cll 6 and 7 as follows:

"6. **Act of default**

6.1 If either party:

(1) has a receiver, manager, receiver and manager, liquidator (including a provisional liquidator), special investigator, statutory manager or similar person appointed (whether by a court or other persons) concerning any of its property, assets, business or affairs;

(2) becomes bankrupt, insolvent or enters into a composition scheme or arrangement (whether formal or informal) with creditors;

(3) assigns its property, assets, business or affairs for the benefit of its creditors; or

(4) has any bona fide distress, execution, attachment or other process made or levied against any of its assets which is not satisfied within 14 days after service,

then there has been an act of default.

6.2 The non-defaulting party is known as the 'innocent party'.

6.3 Each party undertakes to the other that it will promptly notify, in writing, the other of any event which constitutes an act of default by it.

7. **Termination**

7.1 Upon the occurrence of an act of default the innocent party may, in its absolute discretion, and at such time as it may determine all or some of the following:

(1) terminate this Agreement; and

(2) exercise any other power or right which the innocent party may have under this Agreement or in law or in equity.

7.2 If the Agreement is terminated without default on the part of the Grantee, the Premium will be refunded to the Grantee."

[16] Although the heading to cl 2 suggested that compliance with cl 2 was a condition precedent, the effect of cl 1.7 was that headings were not relevant to the construction of the contract. The terms of cl 2 expressed a condition subsequent which could have, had the terms not been met, given rise to an ability to avoid the contract. It is not necessary to consider that further because it is common ground that the Grantee satisfied the terms of cl 2 and gave notice of having done so on 18 December 2020. It is relevant to note the contrast between the contractual significance expressly afforded to the Grantee's conduct referred to in cl 2, and the lack of any comparable significance expressly afforded to the Grantee's payment of the $10 premium within the stipulated time frame.

[17] The Grantee did not pay the $10 premium until 12 September 2022, the same day that it purported to exercise the call option. The Grantor received the payment at 3.45 pm on 12 December 2022 and the Grantee exercised the option less than half an hour later that day.

[18] The Grantor disputed the Grantee's entitlement to enforce the call option. That led to the Grantee making the application for declaratory relief which succeeded before the primary judge.

Consideration

[19] The Grantor submitted to the primary judge that the requirement for payment of the $10 premium strictly within the time limit stipulated in cl 3.2, was both –

(a) a condition precedent to the formation of the call option agreement as a contract; and

(b) a condition precedent to the Grantee's ability to exercise the option.

[20] The primary Judge rejected both submissions. His Honour concluded that the requirement for payment of the $10 premium to the Appellant within the two business days stipulated in clause 3.2 of the agreement was neither a condition precedent to the coming into existence of an enforceable contract between the Grantor and the Grantee, nor of the essence of the contract.

[21] In my view and for the following reasons the primary judge was correct to reach both those conclusions.

[22] The construction of the contract must be done according to the objective theory of contract. In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson standing in the shoes of the parties at the time of contract would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.[3]

[23] There was nothing in the language used by the parties in this particular contract which suggested that despite the fact of the parties having executed a formal written

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3 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46] to [51] per French CJ, Nettle and Gordon JJ; *Victoria v Tatts Group Ltd* (2016) 328 ALR 564 at [51]; *Eleven 17 Ocean Street Pty Ltd v Evangelista Pty Ltd; Eleven 17 Ocean Street Pty Ltd v TWM (Qld) Pty Ltd* [2023] QCA 170 at [15] per Bond JA, with whom Mullins P and Boddice JA agreed.

contract, the parties intended that no contract would become binding between them until one of them had taken a particular specified step at some later date. To the contrary, by their execution of an agreement which provided on its face that it was "made on the 27th day of November 2020" and which recited an intention to be presently bound, the parties plainly evinced their intention was to the contrary.

[24] It is notable that it is not uncommon for contracts to have been executed after the date they bear. The usual assessment of the parties' intention in such circumstances is that they should be regarded as having impliedly agreed that the contract when ultimately executed would operate retrospectively to have governed their relationship from the date which the contract bears.[4] For that reason, I think the better view is that the parties to the executed call option agreement should be taken to have contemplated that, although they entered into the agreement when each of them had, to the knowledge of the other, executed the formal written agreement, they intended that the agreement would operate from the earlier date which they had specified as "the date of the Agreement".[5]

[25] It would follow that it could not have been the parties' intention that cl 3.2 operate in the various ways for which the Grantor contends. I observe:

(a) Clause 3.2 obliged the Grantee to pay the $10 premium to the Grantor within 2 Business days of the date of the Agreement.

(b) There was no ambiguity as to what was meant by "the date of the Agreement". The Agreement was dated 27 November 2020. That day was a Friday.

(c) Assuming that the banks in Cairns were not open on Saturday 28 November 2020 or Sunday 29 November 2020[6], then one can safely conclude that in order for the payment to have been made within 2 Business days of 27 November 2020, the payment would have to be made on or before Tuesday 1 December 2020.

(d) But the contract had not been executed by either party at that time. Accordingly, when, subsequently, the parties executed the agreement, it was already impossible for the Grantee to perform cl 3.2 strictly in accordance with its unambiguous terms.

(e) The parties could not possibly have intended that compliance with a clause which could not be complied with would form a condition precedent to an enforceable bargain coming into existence.

(f) Nor could the parties have contemplated that the contract which they executed was immediately defeasible at the option of the Grantor on the basis that the Grantee was in breach of a condition of the agreement from the outset.

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4 cf *Trollope & Colss Ltd v Atomic Power Constructions Ltd* [1963] 1 WLR 333 at 339.

5 My conclusion in this regard differs from that of the primary judge who regarded the contract as one which the parties treated as commencing on execution. It seems that the parties did not suggest any contrary view in argument before him. See *Townsville Pharmacy No 4 Pty Ltd v V Quattro Pty Ltd* [2023] QSC 105 at [8] per Henry J.

6 This assumption is made necessary by the definition of "Business day" in cl 1.1.

(g) The same logic dictates the rejection of the Grantor's contention that strict compliance with the time limit stipulated in cl 3.2, was intended to be a condition precedent to the Grantee's ability to exercise the option.

(h) Further –

(i) the parties' acknowledgment by their execution of the document that their agreement had been made on 27 November 2020;

(ii) the *de minimis* nature of the $10 premium;

(iii) the contrast between cl 2 (where particular consequences are attached to any failure to enter into and complete a contract for the purchase of the Star Pharmacy within time) and cl 3.2 (where no consequences are attached to any failure to pay the $10 premium within time);

(iv) the contrast between cl 3.3 (where particular consequences are attached to any failure to give notice of exercise of the call option within time) and cl 3.2 (where no consequences are attached to any failure to pay the $10 premium within time); and

(v) the absence of any statement that time was of the essence,

suggest that the proper assessment of the parties' intention is that they did not regard strict compliance with the time limit stipulated in cl 3.2 as an essential part of their bargain.[7]

(i) That conclusion does not mean that cl 3.2 is an irrelevance or cannot be regarded as a promise at all. Rather it means that the clause should be regarded as expressing an inessential or innominate term which amounted to a promise to pay within a stipulated time, breach of which could sound in damages at most unless time was made of the essence by the giving of a notice requiring performance of the obligation within a reasonable time.

[26] The Grantor argued below[8] that, despite the unambiguous language of (1) the parties' statement that "[t]his agreement is made on the 27th day of November 2020" and (2) of cl 3.2 itself, the reference to "the date of the Agreement" in cl 3.2 should be construed as a reference not to 27 November 2020, but as a reference to the subsequent date (either 3 or 4 December 2020) when the agreement was legally concluded as a contract between the parties. There is certainly something to be said for this contention. But even if it were to be regarded as the better view, it would not assist the Grantor. I observe:

(a) The contention would, by its very nature, be inimical to the notion that cl 3.2 was intended to operate as a condition precedent to an enforceable bargain coming into existence. That is because the identification of a starting point for the 2-day period in the clause requires the acceptance of the fact of an

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7 The test to be applied here is that stated in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [48] per Gleeson CJ, Gummow, Heydon and Crennan JJ, namely "[i]t is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is "essential", so that any breach will justify termination".

8 Written submissions of the respondent before the primary judge at footnote 2.

agreement having been legally concluded and the identification of the date on which that happened.

(b) Of course, it would remain to consider the Grantor's contention that strict compliance with the time limit stipulated in cl 3.2 was nevertheless intended to be a condition precedent to the Grantee's ability to exercise the option.

(c) Even if I accepted the premise stated in the chapeau to the present paragraph – which I do not - in my view the considerations identified at [25](h) above strongly support the conclusion that the promise could not have been intended to be a condition precedent to the Grantee's ability to enforce the call option agreement. Further support is to be found in the uncertainty of the time within which the payment would have to be made (given that the premise assumes that the certain starting date of 27 November 2020 is to be put aside).

(d) The result is that even on this analysis, the clause would be regarded as an inessential promise, breach of which would prima facie sound only in damages unless time was made of the essence by the giving of a notice requiring performance of the obligation within a reasonable time.

[27] The Grantor also argued that "the very existence and enforceability of the Call Option Agreement as a contract was dependent upon the act of payment of the Premium in conformity with the Call Option Agreement". In other words, the Grantor argued that the call option agreement should be regarded as having failed for want of consideration. I reject that argument. In my view recital C should be construed as recited an intention to be presently bound because the Grantee had promised to pay the $10 premium. Clause 3.1 should be regarded as conveying that the grant of the option is in consideration of the promise to pay the $10 premium. Clause 3.2 should be construed as having expressed such a promise, albeit a promise which should be regarded in the way I have explained at [25](i) and [26](d) above. Such a promise would operate as consideration sufficient to support the conclusion that a contract had been formed as between the parties. Related issues have been the subject of discussion in *Lydia Court Pty Ltd v Panousis*;[9] *Barba v Gas and Fuel Corporation (Vic)*;[10] and in *Himbleton Pty Ltd v Kumagi (NSW) Pty Ltd*.[11] I agree with the primary judge's observations that –

> "The conclusion inherent in that reasoning is that where the consideration is nominal, a statement in a contract that the consideration is an amount which has been paid should be construed, in the event the amount has not been so paid, as meaning the consideration was a promise to pay the amount. The premise of such reasoning seems to be the parties' mutual intention, inherent in the contract's acknowledgement of payment, that they were executing a contract for which the grantee's consideration had already been given. Put another way, they did not intend that the commencement of an enforceable contract between them was dependent upon the future payment of consideration for the grant of the option, for they regarded consideration for the grant as already having been given. It is that feature which seems to justify the reasoning that if the amount acknowledged as paid turns out to be unpaid, then it is not a missing

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9 (1973) 2 BPR 9178.
10 (1976) 136 CLR 120.
11 (1991) 29 NSWLR 44.

> requisite element for the commencement of an enforceable contract. Rather it merely becomes a debt owing for an amount mutually but wrongly regarded as having been paid and thus impliedly promised to be paid.
>
> Such reasoning suggests a liberal interpretative approach in favour of the existence of a contract is apt, absent contrary textual indications, where there has been neglect in connection with the paying of consideration of a nominal scale. If such an approach is apt where the nominal payment is supposed to have been made on or before the act of entry into the contract, then it is apt, absent contrary textual indications, when the payment is expressly permitted to be made subsequent to entering into the contract, as in the present case. …"[12]

[28] It remains to note that the Grantor argued for a different conclusion as to the essentiality of strict compliance with cl 3.2 than that which I have reached by reference to cases addressing the essentiality of time stipulations in relation to clauses governing a grantee's actual exercise of an option.[13] Like the primary judge I do not think the reasoning which justifies that conclusion in such cases is apposite to the present case. Contrary to the Grantor's submission, the fact that cl 1.6 refers to the option as being an irrevocable offer does not operate to import that line of reasoning. The process of construction still must proceed in the orthodox way identified at [22] above. As the primary judge observed, "we are not here concerned with essentiality of time stipulations for the actual exercise of the granted option".[14] This was a contract in which, from the outset, there was a positive obligation binding upon the Grantee, namely to pay the $10 premium. That had to be paid whether or not the Grantee sought to enforce the option by accepting the Grantor's irrevocable offer in the manner set out in cl 3. That must be so because cl 4 specifically provided for what would happen if the option was not exercised. It is simply not arguable that the promise in cl 3.2 could be regarded as a non-promissory term. Nothing in cl 1.6 made it so.

Conclusion

[29] The Grantor has not demonstrated that the contractual requirement for payment of the $10 premium within the stipulated time limit was essential either to the enforceability of the call option agreement as a contract or to the valid lawful and effective exercise of the option to purchase provided for in the call option agreement.

[30] The appeal must be dismissed, with costs.

[31] **KELLY J:** I agree with Bond JA.

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12 *Townsville Pharmacy No 4 Pty Ltd v V Quattro Pty Ltd* [2023] QSC 105 at [68]-[69] per Henry J.

13 As a starting point, see for example *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 and *Rushton (SA) Pty Ltd v Holzberger* [2003] QCA 106 at [14]-[18] per Williams JA.

14 *Townsville Pharmacy No 4 Pty Ltd v V Quattro Pty Ltd* [2023] QSC 105 at [53] per Henry J.