SUPREME COURT OF QUEENSLAND

CITATION:	*First Church of Christ, Scientist, Brisbane as Trustee under Instrument 702027154 v Ormlie Trading Pty Ltd* [2003] QSC 351
PARTIES:	**FIRST CHURCH OF CHRIST, SCIENTIST, BRISBANE AS TRUSTEE UNDER INSTRUMENT 702027154** (applicant) v **ORMLIE TRADING PTY LTD CAN 058 322 651** (respondent)
FILE NOS:	SC No 8292 of 2003 SC No 8450 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	17 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2003
JUDGE:	Philippides J
ORDERS:	**1. Declared that the parties had not entered into a binding contract to purchase the property at Red Hill, Brisbane** **2. Caveat No 706934982 be removed** **3. The respondent pay the applicant's costs of the application to be assessed on the standard basis**
CATCHWORDS:	*Black & Ors v Australand Holdings Pty Ltd* (Unreported, Supreme Court of New South Wales, 27.08.03) *BP Oil New Zealand Ltd v Van Beers Motors Ltd (*Unreported, High Court of New Zealand, 10.03.92) *Commonwealth Bank of Australia Ltd v G H Dean & Co Pty Ltd* [1983] 2 Qd R 204 *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521 *Masters v Cameron* (1954) 91 CLR 353 *Oracle New Zealand Ltd v Price Waterhouse Administration Ltd* [1996] ANZ Conv Rep 295 *Perry v Suffields Limited* [1916] 2 Ch 187 *Van Der Hulst v Tainui Corporation Ltd* [1998] 2 NZLR 359
COUNSEL:	B O'Donnell for the applicant

D J Campbell for the respondent

SOLICITORS: Dibbs Baker Gosling for the applicant
Hemming and Hart for the respondent

PHILIPPIDES J:

The applications

[1] The applicant, First Church of Christ, Scientist, Brisbane, is the registered owner of two parcels of land at Red Hill in Brisbane. On 28 August 2003, the respondent, Ormlie Trading, lodged a caveat on both titles claiming an equitable estate in fee simple as purchaser.

[2] On 24 September 2003 the respondent commenced an action seeking a declaration as to its interest in the property on the basis of a claim that it had entered into a binding contract to purchase the property from the applicant on 13 July 2002, and seeking specific performance of that contract. The applicant has brought two applications, one for the removal of the caveat and the other for a determination of the issue of whether the parities had entered into a binding contract of sale. The applicant, by a contract dated 19 August 2003, has contracted to sell the property to another party, Ms Adam for $1.1 million. That contract is due to settle on 20 October 2003.

[3] The applications were adjourned to today so as to permit cross examination by the respondent. The matter proceeded today on the basis that the question of law as to whether a binding contract had been entered into would be determined, thereby rendering the pursuance of the application to remove the caveat unnecessary.

[4] The respondent in its Statement of Claim pleads that;

(a) The parties entered into a written agreement constituted by three letters being;
  (i) a letter from the respondent to Mr Morehouse dated 11 June 2003;
  (ii) a letter from the respondent to the applicant dated 13 July 2003; and
  (iii) a letter from the applicant to the respondent dated 15 July 2003.
(b) The applicant repudiated the contract by its letter dater 12 August 2003 purporting to withdraw from the contract and by its conduct in entering into the contract of sale to Ms Adam.

The background facts

[5] It is necessary to set out in some detail the history of the correspondence between the parties. On 11 June 2003 Mr Miles, a director of the respondent, faxed a letter on behalf of the respondent to Mr Morehouse for consideration by the executive of the applicant making an “offer in principle to purchase the property for $845,000”. The letter mentioned a number of considerations associated with the offer, including

that the tenants who were then in residence would be permitted to remain as tenants for one year, that an allowance of $1,666.66 by way of relocation assistance would be provided to those tenants who did not wish to remain as tenants and an offer to purchase chattels on the premises for $10,000. The letter concluded "on receiving advice that your board finds our offer in principle acceptable, we will prepare a more formal contract for signature".

[6] On 3 July 2003, Ms Critchley, the clerk for the executive board of the applicant, sent a letter to Mr Miles advising him that the board had "received a conservative estimate that the property is worth considerably more than the offer" and inquiring whether the applicant would revise their offer. By letter dated 13 July 2003 from Mr Miles to Ms Critchley the respondent submitted a revised offer of $920,000 made up as follows:

(a)	Property	$905,000
(b)	Goods and Chattels	$10,000
(c)	Relocation assistance or rent subsidy	$5,000

[7] By letter dated 15 July 2003, Ms Critchley, on behalf of the board of the applicant responded to Mr Miles stating that the board accepted the respondent's offer in principle and "looks forward to receiving your more formal contract as outlined in your letter of 11 June".

[8] On 21 July 2003, Mr Miles wrote to Ms Critchley confirming acceptance of "our revised offer in principle" and stating:

> "We appreciate the promptness of the board in their decision and response and we are now in the process of getting our matters in order. As we are new at this type of business, we request the Board's patience to get our thoughts down on paper and forward them to the Board. These thoughts can be the fundamental to the actual Contract of Sale. When the Board feels comfortable with our ideas and we are comfortable with theirs, then we can put these combined and mutually accepted and beneficial to all concerned, ideas, on to an official Contract of Sale.
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> In order to avoid large legal fees to both parties in preparing the Contract of Sale, Ormlie and the Board, First Church of Christ, Scientist, Brisbane could perhaps exchange these ideas back and forth until we both reach an agreement. Please do not misunderstand us, the purchase price is $920,000, but we are referring to ideas like when do we settle; when do the tenants want to move and how much help do they want from us and other matters. You have already indicated one idea that there are some chattels that need to be identified as personals.
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> We hope to have our first meeting on Friday, 24th July, 2003. On Monday 28th July we will fax our first document of ideas to you. Please feel free to comment on all of them and let us come to an agreement very quickly. We in principle do not have many ideas to get agreement on but some of the families may need a little time

> longer than 90 days but definitely not longer than 180 days for the sale to be settled. By law we will have the 10% deposit ($92,000), by the 14th day after the Contract of Sale is signed."

[9] By letter dated 31 July 2003 from Mr Miles to Ms Critchley, Mr Miles listed a number of issues for resolution. These included *inter alia* the need to conduct due diligence on the property, the need to obtain a valuation for the purposes of finance, the need for a list of rental agreements. It also acknowledged that a stocktake of the chattels had been completed. The letter stated:

> "Items addressed so far:
> From the letter addressed to the Church on 21st July, 2003.
> 1. The settlement period would be between 90 to 180 days.
> 2. The sale price is $905,000.
> 3. The Chattels is $10,000.
> 4. The Relocation Subsidy is $5,000.
> 5. The target dates for the tenants to vacate the premises, if they wish to.
> 6. The tenants who decide to stay on will have no change to their rents for a period of 12 months from the date of the sale.
> 7. Chattels have been identified and will be included in the formal Contract for Sale.
>
> We hope that this meets with your understanding to date. The Ormalie Board will meet again on 8th of August to discuss any items that the Church has addressed to us and respond back on 11 August, 2003. If there are no comments from the Church then we will accept that the Church agrees with Ormlie, in principle, and to move forward. ..."

[10] The matter was discussed at the meeting of the Executive Board of the applicant on 11 August 2003 and it was resolved to list the property for sale with Arthur Conias Real Estate. On 12 August 2003 the applicant appointed Mr Conias as its agent for the sale of the property.

[11] By letter dated 12 August 2003, Ms Critchley advised Mr Miles that the Executive Board hereby withdrew "from the principal agreement that we gave July 15 2003" and stated that the Executive Board had placed the sale of the property in the hands Arthur Conias Real Estate and that any further negotiations should be conducted with that firm.

[12] By letter dated 15 August 2003, Mr Miles responded expressing surprise and disappointment at this development and stated that "nevertheless, as per your requirement, we have commenced final processes to purchase the property. Through our solicitors, Arthur Conias Real Estate have been instructed to prepare a Contract of Sale as per the Terms and Conditions agreed to at the sale price of $920,000. Our expectations are that despite this change the Board will still honour its commitment and in essence follow through its agreement with Ormlie."

[13] On 18 August 2003, Mr Nathan, the respondent's solicitor, wrote to Arthur Conias Real Estate as follows:

"… My clients have instructed me to advise you to draw and present a contract to the First Church of Christ to purchase the abovementioned property.

The details are as follows:

1. Purchasing entity – Goki Prasad, Les Miles and Wayne Brown as Trustees of the Clifton Terrace Trust.
2. Purchase price $920,000.00.
3. Deposit $92,000.00 payable 28 days after execution of the contract.
4. Special conditions:

    a. Of the $920,000, $5000 is to be held in trust and used for the benefit of the current residences at the property. This may be used for either relocation assistance or rent subsidy for those residences.
    b. Contract subject to and conditional upon a complete due diligence being conducted by my clients within 60 days from the date of this contract. In the event that the result of such due diligence is not to my clients' satisfaction, then my clients may terminate the contract by giving such a notice on or before the expiration of 60 days from the date of this contract. In the event that no notice is given, the buyer's benefit to this provision is automatically waived.
    c. The Seller is to identify at the time of execution of the contract such chattels to be excluded from the contract.

5. Settlement to occur on 19 December 2003.

Please prepare the contract and submit same for my client's execution. My clients are in Melbourne and will be in a position to execute same tomorrow."

[14] On 19 August 2003, a contract was prepared in accordance with the terms of the letter of 18 August 2003. It provided for settlement on 19 December 2003 and incorporated the following special conditions:

"1. Notwithstanding any other conditions contained in this Contract, the deposit of $92,000.00 (ninety-two thousand dollars) shall be payable 28 (twenty-eight) days after execution of this Contract.

1. Of the $92,000.00 (ninety-two thousand dollars) deposit, $5,000.00 (five thousand dollars) is to be held in trust and used for the benefit of the current residences at the property. This may be used for either relocation assistance or rent subsidy for those residences.
2. This Contract is subject to and conditional upon a complete due diligence being conducted by my clients within 60 (sixty) days from the date of this Contract. In the event that the result of such due diligence is not to my clients' satisfaction, then my clients may terminate this contract by giving such a notice on or before the expiration of 60 (sixty) days from the date of this Contract. In the event that no notice is given, the buyer's benefit to this provision is automatically waived.

3. The Seller is to identify at the time of execution of this Contract such chattels to be excluded from the Contract."

The submissions

[15] On behalf of the applicant it was submitted that an analysis of the correspondence indicated that the matter comes within the third category of *Masters v Cameron,*[1] that is, that the parties did not intend to make a binding agreement unless and until a formal contract was executed. Alternatively, it was contended that if the parties otherwise did enter into a binding agreement, the agreement was void for uncertainty because of lack of agreement on essential terms.

[16] On behalf of the applicant, emphasis was placed on the use of the words "offer in principle" in the correspondence. It was used in the initial offer of 11 June 2003 and whilst not repeated in the subsequent higher offer, that offer, it was submitted, was to be construed in the light of the earlier offer and as incorporating parts of the earlier offer, which were not being altered in the revised offer. Furthermore, it was noted that the acceptance on 15 July 2003 was an acceptance of "your offer in principle". It was submitted that the fact that the offer and acceptance were therefore expressed only "in principle" was a strong indication that all that was intended was a non binding commitment. In this regard reliance was placed on *Oracle New Zealand v Price Waterhouse Administration,*[2] where Mackay J at 297, considered the meaning of the phrase. His Honour accepted that the phrase is commonly used to distinguish a non binding understanding from a binding commitment, stating:

> "It is an indication that there is no serious objection or obstacle, and that the party is willing to enter into a contract once details are settled. In commercial negotiations there is often little point in spending time and energy on settling details unless there is agreement in principle. Once that point has been reached, then it is worthwhile negotiating the details, but there is no contract until all issues have been settled. To regard an agreement in principle as binding would be to deprive the qualifying words "in principle" of any meaning at all."

[17] Reference was also made to the decision of *BP Oil New Zealand Ltd v Van Beers Motors Ltd*[3] which concerned negotiations for the lease of land for a service station where one party had written to the other setting out terms and conditions which would be acceptable to it and the other replied confirming its acceptance "in principle". Penlington J at pp 50-51 determined that the words "in principle" indicated that the terms and conditions were being accepted "at mutually acceptable guidelines for the purpose of moving the negotiations forward to a head of agreement". His Honour stated that the words 'in principle' were important words of reservation and inferred that they had been deliberately used to make it clear that the party using them had no intention *at that time* of entering a binding contract. His Honour went on to state that:

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1 (1954) 91 CLR 354 at 360.
2 [1996] ANZ Conv Rep 295.
3 Unreported, High Court of New Zealand, 10.03.92.

> "The acceptance in principle allowed the entry into an arrangement as envisaged in the letter of 26 March and at the same time reserved the right to Van Beers Motors to withdraw or to alter its position up until the time the heads of agreement were signed and binding legal relations were created."

[18] Counsel for the applicant also referred to *Black v Australand Holdings Pty Ltd*[4], where Einstein J at p 50 considered the not dissimilar phrase "agreement in principle". His Honour considered that, in the circumstances of that case, the words imported the idea that there must necessarily be agreement on further terms to be embodied in a formal contract. It should be noted, however, that the matter was made more explicit in that case by the reference in the correspondence there under consideration to the limited nature of the "firm instruction" held by the solicitors.

[19] Counsel on behalf of the applicant also submitted that the absence of agreement or even discussion about a number of essential terms also confirmed the impression that the parties had not intended to enter into a binding agreement until formal contracts were prepared and signed. These terms it was said concerned whether there was to be a deposit and, if so, the amount and time of payment when settlement was to take place, and the identity of the chattels to be sold.

[20] Counsel for the applicant further submitted that the court should take into account the subsequent conduct of the parties in order to determine whether final agreement had been reached. In this respect it was submitted that the subsequent conduct showed that the parties did not act as though they had entered into a final agreement. In particular it was said that:

(a) The respondent in its letter of 21 July 2003 identified that there were a number of additional matters that needed to be agreed, such as when does the contract settle, when do the tenants move out, how much help was Ormlie Trading to give the tenants, etc;

(b) By its letter of 31st July 2003 the respondent identified some additional terms, which it felt free to introduce into the proposed agreement, in particular, concerning due diligence on the property, coupled with an obligation on the applicant to provide full disclosure to the purchaser of any matters that "we should know about";

(c) When the respondent submitted its written contract for acceptance by the applicant, it involved a number of significant departures from the correspondence referred to in the Statement of Claim. These involved:

  (i) A change in the identity of the purchaser;

  (ii) A stipulation for vacant possession of the property (rather than an arrangement under which the current tenants could remain for up to 12 months);

  (iii) Payment of a deposit of $92,000 but that the deposit not be payable until 28 days after execution of the contract;

  (iv) Out of the deposit of $92,000 a sum of $5,000 to be held in trust for the benefit of the current tenants of the property;

  (v) A condition subsequent, by which the purchasers would conduct due diligence within 60 days of the contract. In the

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4 Unreported, Supreme Court of New South Wales, 27.08.98.

event that the result of the due diligence was not to the purchasers' satisfaction, the purchasers were entitled to terminate the contract; and

(d) No deposit has been paid or tendered by the respondent.

[21] On behalf of the respondent it was submitted that all of the essential terms of the contract had been agreed upon by the time of the letter of acceptance of 15 July 2003, namely the parties to the transaction, the property or subject matter of the transaction and price or consideration. It was submitted, relying on *Perry v Suffields Limited*[5] and *Van de Hulst v Tainuj Corporation Limited*,[6] that the fact that no deposit was paid or agreed upon was not of moment, as agreement as to a deposit was not an essential term necessary for a contract to be created. Furthermore, it was submitted, on the authority of *Perry v Suffields Limited*, that the time for settlement was also not an essential term. As to the identification of the chattels referred to in the correspondence, it was submitted that there was in place a procedure for identifying the chattels to be sold and that the procedure was followed and that agreement had been reached with an inventory being carried out on 26 July 2003.

[22] Counsel for the respondent submitted that the correspondence indicated that there was an intention to create a legal relationship. It was contended that this case fell within the first category of cases described in *Masters v Cameron*, it being one in which "the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect".

[23] It was submitted by counsel for the respondent that the use of the words "in principle" did not indicate that no binding agreement had been reached. Although accepting that there was authority for the proposition that the term "in principle" may indicate that an agreement is non-binding, it was submitted that such a phrase must be interpreted in context. In this matter, it was argued that the use of the words "in principle" indicated the existence of an agreement with the formalities to occur at a later time, all essential terms being agreed and no further negotiation of essential matters being necessary. Accordingly, it was submitted that as there was no need for further negotiations, the use of the term "in principle" had no effect other than contemplating that an agreement would be put into a more formal contractual context in the future.

[24] The respondent argued that the subsequent conduct of a party must be treated with caution. In this regard, reliance was placed on *Perry v Suffields*[7] where Lord Cozens-Hardy MR said at p 191:

> "Though, when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties, … the complete contract thus arrived at cannot be affected by subsequent negotiation. When once

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5 [1916] 2 Ch 187 at 191.
6 [1998] 2 NZLR 359 at 362.
7 [1916] 2 Ch 187.

> it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at."

[25] It was submitted on behalf of the respondent that although seemingly inconsistent with a belief that there existed an established contract, the respondent's conduct in submitting a second contract on 19 August is explained:

(a) the respondent thought that the reason for the appointment of the real estate agent was to ensure that a more formal contract was to be entered into;
(b) the respondent was commercially naïve. Apart from the correspondence which shows a great deal of inexperience, the respondent's directors thought they were dealing with a vendor who, unlike the general population, could be implicitly trusted because of its religious status;
(c) the respondent appeared to be doing anything it could to keep the deal intact.

Did the Parties enter into a contract for the purchase of the property?

[26] It is well established that the question of whether an intention to create a legal relationship is one to be determined objectively; see *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*.[8] It is also established that recourse may be had to the parties subsequent conduct in determining whether a final agreement had been reached, see: *Commonwealth Bank of Australia Ltd v G H Dean & Co Pty Ltd*[9]; *Marek v Australasian Conference Association*.[10]

[27] Whilst I accept the respondent's submission that by 15 July 2003 there had been agreement on the essential matters of the identity of the parties the nature of the property and the consideration, I nevertheless do not consider that there was evident by that time an intention to enter into legal relations.

[28] It is not insignificant that in the initial offer of 11 June 2003 the words "in principle" were used and that that terminology was also used in the applicant's letter of acceptance and letter of withdrawal, and indeed in other correspondence. I adopt what was said by Mackay J in *Oracle New Zealand v Price Waterhouse Administration*; the applicant in accepting the respondent's offer in principle adopted terminology indicating that there was no serious objection or obstacle, but also no unqualified acceptance. The correspondence progressing the negotiations, particularly that of 21 July 2003 and 31 July 2003, shows the parties were moving forward tentatively and not seeking to enter into an immediately binding agreement. The use of the phrase "in principle" reflected a cautious approach by both parties. This is particularly demonstrated by the fact that in the letter of 31 July 2003 (after the date by which the respondent alleged an agreement had been concluded) the respondent enumerated various additional items that had by then been addressed by the parties and stated "if there are no comments from the Church then we will

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8 (1986) 40 NSWLR 631.
9 [1983] 2 Qd R 204 at 209.
10 [1994] 2 Qd R 521 at 529.

accept that the Church agrees with Ormlie, *in principle*, and to move forward" (emphasis added).

[29] Further support for the view that the parties did not intend to enter into a legally binding contract is to be found in the subsequent conduct of the parties. It is significant that the respondent, through its solicitor, proposed in the letter of 18 August 2003 significant new conditions; in particular, the term that the contract provide for vacant possession, the term that the contract be conditional upon completion of due diligence and the term giving the respondent a right of termination. That letter cannot be explained away on the basis contended for by the respondent. It must have been appreciated that the terms proposed in that letter involved a substantial variation from what had previously been discussed.

[30] Accordingly, I find that no contract of sale of the property had been concluded between the parties and that the applicant is entitled to the removal of the caveat.

[31] I shall hear submissions as to the terms of the order.