SUPREME COURT OF QUEENSLAND

CITATION:	*Derrame Pty Ltd v MacDonald Pace Pty Ltd* [2003] QSC 408
PARTIES:	**DERRAME PTY LTD (ACN 010 615 700)** (Applicant) v **MacDONALD PACE PTY LTD (ACN 099 678 681)** (Respondent) **MacDONALD PACE PTY LTD (ACN 099 678 681)** (Applicant) v **DERRAME PTY LTD (ACN 010 615 700)** (Respondent)
FILE NO/S:	S 844 of 2003 S 929 of 2003
DIVISION:	Trial
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	5 December 2003
DELIVERED AT:	Townsville
HEARING DATE:	28 November 2003
JUDGES:	Cullinane J
ORDER:	**I make the following declaration:**

> **That MacDonald Pace Pty Ltd by the notice which accompanied the letter from its solicitors to the solicitors for Derrame Pty Ltd dated 17 October 2003 validly exercised the option conferred upon it by the option agreement entered into between the parties to purchase land described as Lot 97 on Crown Plan T11868, County of Elphinstone, Parish of Coonambelah.**

I dismiss the application of Derrame Pty Ltd seeking a declaration that the option was not lawfully exercised.

I order Derrame Pty Ltd to pay the costs of MacDonald Pace Pty Ltd of and incidental to the applications to be assessed.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION & INTERPRETATION OF CONTRACTS – where one party purported to exercise option to buy land – where other party refused to accept that option had been exercised correctly, arguing that purported buyer had not complied with all elements required in exercise of option – whether exercise of option simply required notice given by buyer or whether subsequent actions set out in contract were essential to a valid exercise of that option

Laybutt v Amoco Australia Pty Ltd (1974-75) 132 CLR, considered
George v Cluning (1929) 28 ALR 57, distinguished
Lewes Nominees Pty Ltd v Strang (1983) 49 ALR 328, distinguished

COUNSEL: A Moon for Derrame Pty Ltd
A Lyons for MacDonald Pace Pty Ltd

SOLICITORS: Connolly Suthers for Derrame Pty Ltd
Boulton Cleary & Kern for MacDonald Pace Pty Ltd

[1] These two applications involve in substance the same issue, namely whether MacDonald Pace Pty Ltd (MacDonald Pace) has validly exercised an option to purchase land situated at 81 Palmer Street, South Townsville, on which the Metropole Hotel is situated.

[2] Derrame Pty Ltd (Derrame) granted the option to purchase the land by written agreement dated 19 March 2002. The contract, which is in standard REIQ form and which is the subject of the option, is a schedule to the option agreement.

[3] The issue to be resolved is a rather narrow one.

[4] Under the heading "Exercise of Option" appears the following:

> *"3.1 This option shall remain open for acceptance by the Buyer until five o'clock in the afternoon of the option date and may be exercised by notice in writing in that behalf from the Buyer to the Seller.*
>
> *3.2 The notice exercising the option as aforesaid shall be accompanied by the Contract in duplicate duly executed by the Buyer.*
>
> *3.3 If the Buyer shall exercise the option it shall thereupon pay the stakeholder the balance of the deposit.*
>
> *3.4 The Fee shall not be brought into account as part of the deposit and part payment of the Price under the Contract."*

[5] Clause 1.3 of the Option Agreement provides:

> "*1.3 Headings are for ease of reference only and shall not affect the interpretation of this Agreement."*

[6] The option date was 18 October 2003.

[7] Of particular interest to the issue here are the contents of and notes to the items schedule to the contract relating to finance.

FINANCE

SUBJECT TO FINANCE

IF THIS CONTRACT IS TO BE **SUBJECT TO FINANCE** THEN ITEMS **S,T** AND **U** MUST BE COMPLETED IN EVERY RESPECT AND ITEM **V** MUST BE DELETED AND INITIALLED.

NOT SUBJECT TO FINANCE

IF THIS CONTRACT IS NOT TO BE **SUBJECT TO FINANCE** THEN ITEMS **S, T** AND **U** MUST BE DELETED AND INITIALLED AND ITEM **V** SHALL APPLY

S	LENDER OR CLASS OF LENDER: _____
T	THE APPROVAL DATE: _____
U	AMOUNT OF LOAN: $_____
V	THIS CONTRACT IS NOT TO BE SUBJECT TO FINANCE AND CLAUSE 31 OF THE STANDARD COMMERCIAL CONDITIONS DOES NOT APPLY.

[8] As will be seen items S, T and U were not completed. They were not deleted. Item V was not deleted.

[9] Clause 31 of the standard conditions of the contract provides so far as is relevant as follows:

> "31 *FINANCE CLAUSE*
>
> *31.1 If Items S, T and U are not deleted, this Contract is subject to the Purchaser obtaining from the lender or class of lender specified in Item S on or before the approval date specified in Item T approval of a loan not being less than the amount of loan specified in Item U on terms and conditions satisfactory to the Purchaser and if the Purchaser does not obtain such approval for any reason not being attributable to the Purchaser's own default, the Purchaser may terminate this Contract by notice in writing given to the Vendor."*

[10] By letter of 17 October 2003, solicitors acting for MacDonald Pace forwarded a letter to the solicitors for Derrame in the following terms:

> *"In accordance with Clause 3.1 of the Option Agreement dated 19 March 2002, MacDonald Pace Pty Ltd hereby exercises the option.*
>
> *Pursuant to Clauses 3.2 and 3.3 of the Option Agreement, we* ***enclose*****:**
>
> *1. Notice of Exercise of Option;*
>
> *2. Contract of Sale in duplicate duly executed by the sole director of MacDonald Pace Pty. Ltd.; and*
>
> *3. Bank cheque made payable to 'Connolly Suthers' as stakeholder for the sum of $97,000.00, being payment of deposit monies."*

[11] It is desirable if I also set out the first of the documents referred to in the letter, namely the notice of exercise of option:

Notice of Exercise of Option - Clause 3.1

TO: DERRAME PTY LTD ACN 010 615 700
416 Flinders Street
TOWNSVILLE Q 4810
("the "Seller")

NOTICE OF EXERCISE OF OPTION

***NOTICE IS HEREBY GIVEN** by **MACDONALD PACE PTY LTD ACN 099 678 681** (the "Buyer") to the Seller that the Buyer irrevocably exercises the option over the Land hereinafter described granted to the Buyer by the Seller by the Agreement dated the 19th day of March 2002.*

THE LAND

Means that all piece or parcel of land described as Lot 97 on CP T11868, County of Elphinstone, Parish of Coonambelah, Title Reference 20355036.

*Signed by **WAYNE BLAKELY MACDONALD**)*
as the sole director and authorised officer of)
***MACDONALD PACE PTY LTD**)*
***ACN 099 678 681**)*

[12] The contract which accompanied the notice of exercise was in the same terms as the contract in the schedule except that in the case of items S, T and U in the items schedule the following appeared:

S	LENDER OR CLASS OF LENDER:	Bank of Queensland
T	THE APPROVAL DATE:	10 November 2003
U	AMOUNT OF LOAN:	$670,000-00

[13] By a letter of 21 October 2003, solicitors for Derrame wrote to the solicitors for MacDonald Pace stating that their client took the view that the option had not been exercised in accordance with the requirements of the option agreement. This, it was said, was because in order to exercise the option it was necessary that the notice of exercise of the option be accompanied by the contract executed by the buyer, the contract being defined as the contract in the schedule to the option. Since the contract which had been forwarded with the notice of exercise of the option differed from that in the schedule to the option, insofar as it provided for the obtaining of finance from the Bank of Queensland for a loan in the sum of $670,000 by 10 November 2003, the option had not been validly exercised.

[14] MacDonald Pace by its solicitors rejected this claim in a letter of 22 October 2003, claiming in effect that all that was required to exercise the option was to give the notice which clause 3.1 provides for. In addition it was contended that, since in the contract which constitutes the schedule to the option agreement items S, T and U had not been deleted, MacDonald Pace could elect as to whether to make the contract conditional upon finance.

[15] Subsequently finance was approved and MacDonald Pace submitted a contract which was unconditional as to finance.

[16] The primary issue to be resolved is whether the obligation for which clause 3.2 provides is a requirement for the valid exercise of the option.

[17] The precise legal analysis of an option has been the subject of a great deal of debate over a long period. In *Laybutt v Amoco Australia Pty Ltd* (1974-75) 132 CLR at 57 Gibbs J (as he then was) discussed this subject at pp. 71 and 72.

> *"However, there is what Dixon CJ in* Braham v Walker *called a 'standing controversy' as to the true nature of an option of purchase. One view is that an option to purchase is 'a contract for valuable consideration, viz., to sell the property (or whatever the subject matter may be) upon condition that the other party shall within the stipulated time bind himself to perform the terms of the offer embodied in the contract': per Griffith CJ in* Goldsbrough, Mort & Co Ltd v Quinn. *The other view is that 'an option given for value is an offer, together with a contract that the offer will not be revoked during the time, if any, specified in the option'': per Latham CJ in* Commissioner of Taxes (Q) v Camphin. *This difference of opinion is reflected in the judgements in* Carter v Hyde, *where it was held that the personal representatives of the grantee of an option to purchase a lease were, upon giving notice in writing as required by the option, entitled to specific performance of a contract of sale."*

[18] Ultimately he did not find it necessary to express a concluded view on this subject.

[19] The authorities make it clear that exact compliance with the terms of an option is required. See *United Scientific Holdings Ltd v Burnley Borough Council* (1978) AC 904 and *McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1959) SR (NSW) 122. See also *Duncan Properties Pty Ltd v Hunter* (1991) 1 Qd R 101. Derrame contended that clause 3 as a whole contained the requirements for the valid exercise of the option and that the obligation contained in clause 3.2 (to provide an executed contract in the form of the schedule) was a necessary part of the valid exercise of the option and that the failure to do so meant that the option had not been validly exercised.

[20] It was said that viewed as a conditional contract, MacDonald Pace had not satisfied the conditions upon which the coming into existence of the contract depended. Viewed as a revocable offer, MacDonald Pace had not accepted the offer in its terms and should be regarded as having made a counter offer.

[21] This is not a case in which it was argued that if the only requirement for the exercise of an option is the giving of the notice provided for in clause 3.1, the provision of the executed contract in a different form to that in the schedule should lead to the conclusion that MacDonald Pace had not exercised the option. There is nothing to suggest that, if MacDonald Pace was not entitled to submit an executed contract in the form that it did, in doing so it intended the exercise of the option to be contingent upon Derrame's acceptance of the contract so executed. See Barwick CJ in *Quadling v Robinson* (1976) 137 CLR 192 at 197.

[22] Nor is the Court concerned with any consequences which might flow from any breach by MacDonald Pace of its obligation under clause 3.2 if the option has been validly exercised.

[23] Before turning to the primary issue I should also mention a preliminary issue raised by MacDonald Pace. It was said that since the word "may" was used in clause 3.1 the

giving of a notice in writing was optional. A notice might be given orally. Thus if an oral notice was given, clause 3.2 could have no operation.

[24] I do not think that the clause should be construed as suggested. It is clause 3.1 that provides for the means (wholly or partially) by which the option was to be exercised. It should be construed as meaning that if MacDonald Pace wished to exercise the option, it had to do so by a notice in writing. "May" should be read as "must" for these purposes.

[25] In any case MacDonald Pace did give a notice in writing.

[26] I should also add that it is difficult to see why, if the argument is correct, clause 3.2 would not in any case require the exercise of the option orally to be accompanied by the contract executed by the buyer.

[27] Returning to the principal issue to which I have referred, counsel for both parties referred to two judgments of the High Court. Each of these involve the grant of an option. In each case the provision relating to the exercise of the option was in similar terms but different conclusions were reached. In each case notice of the exercise of the option had to be accompanied by some other step, in both cases the payment of a sum of money, and the issue was whether this payment was a necessary part of the exercise of the option.

[28] Before turning to these I should refer to the option in *Laybutt v Amoco Australia Pty Ltd (supra)*. That was a case in which the language used left no doubt that to lawfully exercise the option it was necessary both that a notice in writing be given and that payment of a sum be made.

[29] In the first of the two cases to which I have referred, *George v Cluning* (1929) 28 ALR 57, the relevant clause provided:

> "*6. Exercise of Option: This Option shall be exercised by notice in writing signed by or on behalf of the Proposed Purchaser addressed to the Owner and delivered personally to or sent by prepaid letter post to the Owner at the Owner's address aforesaid, at any time prior to the expiration of this Option or any extension thereof. Such notice shall be accompanied by payment of such further amount as shall TOGETHER with the amount or amounts paid as consideration of this Option and any extension thereof equal one per cent of the purchase price and if sent by post shall be deemed to be delivered in due course of post."*

[30] The matter was complicated by a couple of other provisions in what all members of the court said was a poorly drawn document. One of these related to the payment of a deposit and questions arose as to the relationship between that deposit and the amount which was to accompany the notice of exercise of the option. The other clause also appeared to make some provision for the exercise of the option.

[31] Three members of the court (Barwick CJ, Murphy and Wilson JJ) were of the view that the payment which was required to accompany the exercise of the option was not an integral and essential element of the exercise of the option.

[32] Wilson J said at p. 67:

"*... even if one views cl 6 as conclusive as to the requirements for the valid exercise of the option, I do not construe it as requiring the payment of a sum of money as an integral and essential element of the exercise of the option.*

The first sentence of cl 6 provides that the option shall be exercised by notice in writing signed by or on behalf of the proposed purchaser addressed to the owner and delivered personally to or sent by prepaid letter post to the owner at the owner's address at any time prior to the expiration of the option. The essential requirements for the exercise of the option are wholly contained in this sentence. The second sentence, which refers to the payment of an amount which, together with the amount paid as consideration for the option, shall equal 1 percent of the purchase price is, in my opinion, merely explanatory of the manner in which the provisions of cl 3 relating to the payment of a deposit are to be complied with."

[33] Barwick CJ agreed with what Wilson J had said on that subject and Murphy J dealt with the matter briefly at p. 63:

"*My conclusion is that there was only one sum of $300 referred to twice in the agreement and not two separate sums of $300 and that the payment of the $300 (with credit given for the $100 paid for the option) was not required for the exercise of the option*."

[34] On the other hand Mason J (with whom Aickin J agreed) had a different view. He said at pp. 61 and 62:

"*The option agreement contains a number of inconsistencies. It is so poorly drawn that it is difficult to place very much reliance on its provisions in support of one interpretation rather than another. As the majority in the Full Court thought, some support is to be gained from cll 2 and 3 for the view that the option was exercisable by notice in writing and that the payment of the sum of $300 referred to in cl 3 was consequential upon the exercise of the option having already taken place. However, of greater weight, in my opinion, is cl 6 which commences with the heading 'Exercise of Option', thereby indicating that all that follows goes to the mode of exercise of the option. This is one clear characteristic in a document which is otherwise remarkable for its ambiguities and contradictions. It is not a characteristic which should be obscured by dubious implications to be gathered from less certain provisions.*

I do not accept the submission that the first sentence only of cl 6 is directed to the exercise of the option. That is to treat the heading as having no application to the second sentence. What is more, the payment for which cl 6 provides serves a purpose if it is held to be an element in the exercise of the option. If it be not so held, the purpose of providing for the payment is by no means clear, for cl 3 makes independent provision for the payment of a deposit once the contract comes into existence."

[35] All members of the court agreed that the appeal should be dismissed.

[36] In *Lewes Nominees Pty Ltd v Strang* (1983) 49 ALR 328 the relevant provision in the option was:

"*Exercise of Option*

This option shall be exercised by notice in writing signed by or on behalf of the proposed purchaser addressed to the owner and delivered personally to or sent by prepaid letter post to the owner at the owner's address aforesaid, at any time prior to the expiration of this option or any extension thereof. Such notice shall be accompanied by payment of such further amount as shall TOGETHER with the amount or amounts paid as consideration of this option and any extension thereof equal 10 per cent of the purchase price and if sent by post shall be deemed to be delivered in due course of post."

[37] The Court of Appeal in Western Australia had held that in order to validly exercise the option, a notice in writing had to be given and such notice had to be accompanied by a payment of the amount for which the clause provided.

[38] Gibbs CJ (with whom the other four members of the court agreed) dealt with the matter at pp. 328 and 329 in the following way:

> "*Clause 3 provides that the option shall be exercised by notice in writing and that such notice shall be accompanied by payment. The conjunction of these requirements suggests that payment as well as notice is a condition of the exercise of the option, and that view is supported by the fact that both requirements are stated in one clause which bears the heading 'Exercise of Option'. The option contains no indications to the contrary*.
>
> *On behalf of the appellant it was submitted that guidance for the decision of the present case can be found in* George v Cluning *(1979) 28 ALR 57. In that case the option agreement contained a provision, cl 6, which was in substance identical with cl 3 in the present case, but it also contained two other provisions, cll 2 and 3, which have no counterpart in the present agreement, and which influenced the majority of the court in that case to hold that payment was not an element of the exercise of the option. That decision depended on the particular provisions of the agreement there in question which, as all the members of the court pointed out, were carelessly drafted, and it does not govern the present case where the agreement, although still not without its obscurities, does not contain some of the provisions that were regarded as relevant in that case.*
>
> *In my opinion, the Full Court were right in holding that cl 3 made payment a condition of the exercise of the option in the present case."*

[39] Not surprisingly counsel for Derrame pointed to the heading "Exercise of Option" and what was said to be the conjunction between the requirement to give notice of the exercise of the option and at the same time provide an executed contract.

[40] Counsel for MacDonald Pace on the other hand, drew the court's attention to what it suggested were significant differences between the terms of clause 3 in this case and the relevant clauses in those cases.

[41] It was also contended for MacDonald Pace that the effect of clause 1.3 was that no regard could be had to the heading for the purposes of construing the terms of the option.

[42] The response of counsel for Derrame to the argument of his opponent about the effect of clause 1.3 was to contend that, whilst the heading could not be used to construe the meaning of the actual words used in any part of clause 3, so as to add to or detract from the language used or to resolve any ambiguity in the terms, it could be regarded for the purposes of considering the general effect of the grouping of those clauses under the one heading upon an issue of this kind.

[43] It was Derrame's contention that clauses 3.1, 3.2 and 3.3 all had to be complied with if the exercise of the option was to be valid.

[44] Whatever importance (if any) is to be ascribed to the heading "Exercise of Option" in the present case, it is in my view, having regard to the requirements of clause 1.3, clear that it cannot be the case that the option could only be exercised by compliance with the requirements of clauses 3.1, 3.2 and 3.3. The most obvious difficulty for Derrame comes from the terms of clause 3.3.

[45] The plain language of clause 3.3 is inconsistent with such a construction and no recourse to the heading (if this were to be permitted) could result in the sub-clause being construed in the way contended for by Derrame.

[46] Nor is there the same conjunction between the giving of the notice in writing (provided for here in clause 3.1) and the provision of the executed contract (provided for in clause 3.2) as existed between the giving of the notice and the payment of the sum of money in the two cases that I have referred to, and in particular *Lewes Nominees* on which reliance was primarily placed.

[47] Indeed the fact that these two matters are provided for in separate sub-clauses is a matter of significance here, suggesting the opposite conclusion.

[48] Clause 3 should be understood as dealing with a number of matters relating to the exercise of the option but not limited to the conditions of its exercise. Its proper construction, in my view, is as follows:

- Clause 3.1 provides for the duration of the option and what is required to exercise it, namely the giving of notice in writing prior to the expiration date.

- Clause 3.2 imposes upon the grantee an obligation which is contemporaneous with the exercise of the option but not a requirement of its exercise.

- Clause 3.3 imposes an obligation to be satisfied upon the option being exercised. It is not necessary to consider here whether this requires payment immediately or whether a payment at some time thereafter would satisfy the clause. What is clear is that this is an obligation that only arises upon the contract coming into existence following the exercise of the option.

[49] In view of this finding it is not necessary to consider a further argument advanced by MacDonald Pace. This was that, as the letter from MacDonald Pace's solicitor of 22 October 2003 which I have already referred to claims, MacDonald Pace had a right to elect whether the contract would be subject to finance.

[50] If I understand the argument correctly, it was suggested that by failing to cross out items S, T and U in effect the matter was not dealt with in the contract in the option agreement. It was also submitted that there should be an implied term to that effect.

[51] I am inclined to think that however one reads the clause and notwithstanding the failure to cross out those items, the contract forming the schedule can only be regarded as not subject to finance. It would no doubt have been a matter of commercial significance to Derrame whether the contract was subject to finance or not subject to finance. There is, so far as I can see, no basis for holding that the contract is not complete, or that the matter of whether the contract was to be subject to finance was left to MacDonald Pace's election.

[52] I have reservations as to whether it is appropriate to deal with an issue involving the implication of terms on an application of this kind without any consideration of the factual matrix. However if the matter were to be dealt with simply on the material that is before the court, then my view it would be very difficult to see how the tests found in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1981-82)

149 CLR 337 and *BP Refinery (Western Port) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 have been satisfied in a case such as this. Whilst some of the five terms might arguably be satisfied, in my view the implication of such a term would not be necessary to give business efficacy to the contract nor would its implication be so obvious that it goes without saying. As will be obvious from what I have already said, to imply such a term would contradict the terms of the contract which I think was unconditional.

[53] I make the following declaration:

> That MacDonald Pace Pty Ltd by the notice which accompanied the letter from its solicitors to the solicitors for Derrame Pty Ltd dated 17 October 2003 validly exercised the option conferred upon it by the option agreement entered into between the parties to purchase land described as Lot 97 on Crown Plan T11868, County of Elphinstone, Parish of Coonambelah.

[54] I dismiss the application of Derrame Pty Ltd seeking a declaration that the option was not lawfully exercised.

[55] I order Derrame Pty Ltd to pay the costs of MacDonald Pace Pty Ltd of and incidental to the applications to be assessed.