SUPREME COURT OF QUEENSLAND

CITATION:	*Teviot Downs Estate P/L & Anor v MTAA Superannuation Fund (Flagstone Creek and Spring Mountain Park) Property P/L* [2004] QCA 57
PARTIES:	**TEVIOT DOWNS ESTATE PTY LTD** ACN 091 379 207 (first applicant/first appellant) **ROBPHIL PTY LIMITED** ACN 105 282 353 (second applicant/second appellant) **v** **MTAA SUPERANNUATION FUND (FLAGSTONE CREEK AND SPRING MOUNTAIN PARK) PROPERTY PTY LIMITED** ACN 082 445 663 (respondent/respondent)
FILE NO/S:	Appeal No 11745 of 2003 SC No 9778 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2004
JUDGES:	de Jersey CJ, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – MATTERS NOT GIVING RISE TO BINDING CONTRACT – VAGUENESS AND UNCERTAINTY – SALE OF LAND – where appellant sought orders for the specific performance of an alleged contract for the purchase of land from the respondent – where appellant contended that a legally binding contract was concluded – where the learned primary Judge dismissed the application – whether the primary Judge erred in law in concluding that the correspondence did not effect a legally binding agreement – whether the primary Judge erred in relying on seven additional features in her reasons for judgment *Corporations Act* 2001 (Cth), s 127(1)(c)

G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631, cited
Godecke v Kirwan (1973) 129 CLR 629, distinguished
Marek v Australasian Conference Association Pty Ltd [1994] 2 Qd R 521, cited
Masters v Cameron (1954) 91 CLR 353, applied
Niesmann v Collingridge (1921) 29 CLR 177, distinguished
Toyota Motor Corp Aust Ltd v Ken Morgan Motors Pty Ltd [1994] 2 VR 106, distinguished

COUNSEL: P A Keane QC, with J H Dalton for the appellants
B D O'Donnell QC, with B T Porter for the respondents

SOLICITORS: Blake Dawson Waldron for the appellants
Allens Arthur Robinson for the respondents

[1] **de JERSEY CJ**: The appellants sought orders for the specific performance of an alleged contract for the purchase of land from the respondent. The learned primary Judge dismissed the application. The appellants had contended that a contract in writing crystallized on or about 29 August 2003. Her Honour rejected that contention. In appealing against her determination, the appellants seek an order that a contract made on 29 August 2003 between the first appellant as purchaser, and the respondent as vendor, be specifically performed.

[2] The relevant sequence of events which, it was submitted, culminated in the creation of a binding contract, began on 22 August 2003 when Mr Phillips, a director of the first appellant, sent a letter to Mr Kochel of the respondent, as follows:

> "Thank you for meeting with me earlier this week and conveying your Board's view that it would put to the Trustees an offer for Spring Mountain at $11,000,000.
>
> 1. We now offer to purchase the en globo land at Spring Mountain for $11,000,000 plus GST calculated under the margin scheme.
> 2. Our offer is subject to 30 day exclusive due diligence period (to start upon the provision of vendor's information) during which time access will be required to all available information and to the site. Written authority to obtain information from Beaudesert Shire Council will also be required.
> 3. Purchaser will be a special purpose vehicle owned and controlled by David, Richard and Justin Scheinberg and Robert Phillips and with appropriate personal guarantees. Purchaser will furnish bank and trade references if required.
> 4. The property to be purchased is all of the undeveloped land held at Spring Mountain, plans, data, brand names, trade marks, intellectual property, approvals, consultants' reports, valuations, estate signage agreements, promotional material, and any bonds or contribution credits with BSC.
> 5. The agent (Alex McWilliam) is retained and paid by the purchaser.
> 6. Due to forthcoming sale of two other properties that we would wish to purchase should Spring Mountain be

> unavailable, this offer is firm until 10 am Friday 29 August after which it may be withdrawn at any time without notice.
>
> 7. Deposit of 1% payable upon contract followed by a further 9% to be lodged when the contract becomes unconditional upon due diligence. Balance to be settled in 45 days thereafter. We will forward you a signed contract (with guarantees) early next week as a token of our commitment to purchase. This contract is capable of acceptance by MTAA, alternatively, we are prepared to negotiate in good faith the terms of the contract or use the Association's solicitor's contract."

[3] On 25 August 2003 Mr Phillips submitted to Mr Kochel a comprehensive draft contract providing for the second appellant's purchase of the land. The accompanying letter read:

> "Lease (sic) find enclosed our contract for the purchase of the en globo land at Spring Mountain for $11m. This follows on from the offer which we submitted last week.
>
> I understand that it is reasonably common practice in Queensland for purchasers to prepare contracts and we submit this contract as a token of our preparedness to be bound to purchase. This is shown by the terms of the personal guarantees given by myself and David and Richard Scheinberg. We have tried to make the contract as uncontroversial as possible but we are willing to negotiate the terms of this contract or your solicitor's contract as required. We have not enclosed our cheque for the initial deposit as we do not know who the stakeholder is – presumably it will be your solicitor. We will forward it as soon as we know.
>
> I reiterate that our offer to purchase is open for acceptance until 10 am on Friday 29 August at which point it may be withdrawn depending upon our success in acquiring one of two other properties.
>
> Please call me if you have any issues concerning our offer or the contract."

(The respondent submitted this displaced any offer constituted by the letter of 22 August 2003.)

[4] Mr Kochel sought advice from the respondent's accountants as to the amount of GST which would be payable. The respondent was in possession of a valuation of the land as at June 2000, in the amount of $4.5m. It was however advised that it would for that purpose be necessary to secure another valuation, as at July 2000. Mr Kochel swore to having communicated that advice to Mr Phillips. On 28 August 2003 Mr Phillips emailed Mr Kochel confirming that the second appellant was prepared to pay "the amount of GST that you are required too (sic) pay based on your June 2000 valuation of approx. $4.5m. The all up figure is around $11.6m." Her Honour proceeded on the basis that the second appellant had however offered to bear whatever GST was payable, and not just such as would be payable on the basis of the June 2000 valuation (cf para [12] reasons), and that

appears to have been affected by the way the parties conducted their cases (cf para [11] reasons). The respondent relied before us on lack of certainty as to the precise amount of GST payable as a feature favouring the view the parties would not have intended to be bound at the early stage.

[5] Then on 29 August 2003 the respondent faxed Mr Phillips in these terms:

> "As discussed with George Kochel of my Office, I write now to confirm that the MTAA Superannuation Fund has considered your letter of offer of 22 August for the purchase of Spring Mountain Estate. In the result the Trustee has agreed to accept your offer of $11 million plus GST on the terms that you have proposed.
>
> In that connection, I would be grateful if you could provide me with a list of the due diligence information that you require. Upon your receipt of the information MTAA will grant a 30 day exclusive due diligence period.
>
> If you have any queries, I would be grateful if you could in the first instance contact the Fund's Solicitor, Mr Robert Gardini and his contact phone number is (02) 9360 4050."

The appellants contend that a binding contract thereby came into existence. The appellants' contention was that the acceptance of the offer gave rise to an immediately binding agreement, a term of which required execution of a formal contract. See *Masters v Cameron* (1954) 91 CLR 353, 360: the appellants would put this case into the first category there described. The respondent, on the other hand, put the case into the third category: "the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract" – and emphasized it was not a straightforward proposed sale: it was the proposed sale of land with development potential, where the appellants sought access to information the respondent had about that, and for a very substantial sum.

[6] Later that day Mr Phillips replied to that fax, saying:

> "This is further to Michael Delaney's letter of today accepting our offer for the en globo land at Spring Mountain and your telephone call of around 10 am to me conveying this. I appreciated that you called me when you did and I thank you for your ongoing co-operation.
>
> I will arrange for our solicitor to get to your solicitor, hopefully today, a list of the due diligence information that is needed from MTAA. I understand that our respective solicitors will now move (sic) finalise the contract. As you will appreciate, we need to have the contract signed so that we can commit to the expenditure of the due diligence process. I would like for this to be resolved on Monday and Tuesday of next week so that I can arrange for our due diligence team to meet on Wednesday when I will be in Brisbane next and then I can arrange to have the process started."

[7] Also on 29 August 2003, the second appellant's solicitor wrote to the solicitor for the respondent confirming the second appellant's wish to "proceed to execution of

the contract as soon as possible to enable the due diligence process to proceed", and seeking comment in relation to the draft contract which had been submitted. In the letter he also said:

> "I confirm that it has already been agreed between the parties that the margin scheme clause will be amended to provide that the purchaser must accept the Vendor's valuation of the property as at 1 July 2000."

[8] By letter dated 3 October 2003, the respondent's solicitor advised that "the Trustee did not approve the proposed sale of englobo (sic) land" at Spring Mountain to the second appellant.

[9] Between the end of August 2003 and that termination of dealings, there had been a number of communications between the solicitors for the parties in relation to the preparation of a contract. The terms of those communications were consistent with the pendency of negotiations. For example, on 4 September 2003, the solicitors for the second appellant, enclosing the "initial deposit" monies, referred to their being paid "under the proposed contract", and referred to the respondent's solicitors' comments "in relation to the proposed contract". On 5 September 2003, the solicitors for the respondent forwarded a draft confidentiality agreement, accompanying a fax headed "MTAA Proposed Sale to Robphil Pty Ltd – Spring Mountain Estate". The introductory section of the draft confidentiality agreement recorded that the second appellant was "considering purchasing the Property…" (emphasis added).

[10] On 29 September 2003 the solicitors for the respondent forwarded an amended version of the draft contract. Significantly, in that draft the delineation of the property to be sold excluded a number of lots which had already been sold or were subject to contracts of sale to others, lots included in the draft contract submitted on 25 August 2003. The respondent's solicitors invited comment on the amended draft.

[11] The next day, by letter to the appellants, the respondent acknowledged the appellants' execution of the amended contract, and stated:

> "… in the face of that action your proposed contract will be put before the Trustee at its forthcoming Investment Sub-committee Meeting to be held at 11.00am on Thursday, 2 October for its consideration."

[12] The reasons why Her Honour concluded that the parties had not reached a binding agreement may be drawn from the following passages in her reasons for judgment:

> "[28] Although there is a symmetry about the offer made on 22 August 2003 and the acceptance in accordance with its terms on 29 August 2003, it is not likely when the proposed transaction was for no less than $11m that the parties intended to become bound upon the communication of the acceptance on 29 August 2003 to a contract for the purchase by the second appellant of the land, subject to that agreement being replaced by the formal contract when the terms were resolved. The exchange of this correspondence

had to be viewed in the context of being a significant transaction.

[29] Apart from the size and nature of the transaction, they (sic) are other indicia that the parties did not intend to be legally bound upon the sending of the letter of 29 August 2003:

(a) the lack of identification in numbered paragraph 4 of the letter of 22 August 2003 of the ancillary property to be sold with the land;

(b) the letter of 22 August 2003 did not specify that the applicants required a binding acceptance of the offer before 10am on 29 August 2003, but merely indicated that the offer could be withdrawn after that time;

(c) it was contemplated that signing of the draft contract to be submitted on behalf of the purchaser would be a method of acceptance of the offer;

(d) the forwarding of the draft contract on 25 August 2003 was described as "a token of the preparedness to be bound to purchase" which was unnecessary if the offer was intended to be capable of producing a legally binding contract upon acceptance;

(e) the eagerness with which the applicants sought to have a formal contract executed;

(f) the provision of the guarantees from the proposed guarantors was an important part of the offer and it is unlikely that the parties intended to be bound to the transaction without those guarantees being provided;

(g) the extent of the matters to be covered in the formal contract document.

[30] In the context of the transaction of such magnitude and some complexity and in the light of the actual communications between the parties from 22 to 29 August 2003, the weight and balance of factors for and against whether the parties intended to be bound to a contract as a result of the communication of the acceptance of the offer by the letter of 29 August 2003 is against the creation of a legally binding contract between the second applicant and the respondent on 29 August 2003."

[13] The first ground of appeal is expressed in these terms:

> "Her Honour erred in law in concluding that the correspondence between the first appellant and respondent between 22 August 2003 and 29 August 2003 did not effect a legally binding agreement, despite its plain words, because of the magnitude and nature of the transaction."

[14] The learned Judge's reasons suggest that she viewed the magnitude of the transaction as only one, albeit important, of a number of considerations contributing to the conclusion that the parties did not intend to be bound prior the execution of a written contract. That follows from the conjunction of paras [28] and [29] of her reasons. Earlier in her judgment, she had referred to the observations of McHugh JA, as he then was, in *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, 634:

> "An agreement for the sale of property at a specified price does not necessarily indicate a legally binding contract. The magnitude, subject matter, or complexities of the transaction may indicate that the agreement was a limited one not intended to have legal effect: *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at 316-317. In New South Wales, real estate is ordinarily sold by signing and exchanging contracts in the form approved by the Real Estate Institute and Law Society. Accordingly, even though the parties agree in writing that real estate is sold for a specified price, the presumption is that no binding contract exists until "contracts" are exchanged: *Smith v Lush* (1952) 52 SR (NSW) 207 at 212; 69 WN (NSW) 220 at 222; *Allen v Carbone* (1975) 132 CLR 528 at 533. The vendor contends that the proper conclusion to be drawn from the sale of land, buildings and equipment which constitute a hospital containing sixty-two beds is that the sale was to be the subject of a formal contract drawn up by lawyers.
>
> However, the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the 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 209 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.
>
> Even when a document recording the terms of the parties' agreement specifically refers to the execution of a formal contract, the parties may be immediately bound. Upon the proper construction of the document, it may sufficiently appear that "the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms": *Sinclair, Scott & Co Ltd v Naughton* (at 317)."

Her having set out this orthodox, comprehensive analysis tends to confirm that Her Honour would not have regarded the magnitude of the transaction as necessarily a definitive consideration taken alone. In any event, as I have said, the way she has expressed her reasons is to the contrary of that.

[15] The appellants focus also on the reference, in that passage from the judgment of McHugh JA in *G R Securities*, to the ordinary position in New South Wales, that for

a binding contract for the sale of land, executed contracts must have been exchanged. There is no basis for a suggestion that Her Honour translated that requirement to Queensland and accordingly found against the appellants. On the other hand, she did justifiably refer to the decision of the Court of Appeal in *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521, 527-8:

> "The usual expectation of parties in negotiation for the sale of land is that they will not be taken to have made a concluded bargain unless and until a formal contract is executed. In this State real estate is ordinarily agreed to be sold by the execution by vendor and purchaser of a form of contract adopted by the Real Estate Institute of Queensland and approved by the Queensland Law Society: see W.D. Duncan and H.A. Weld, *The Standard Land Contract in Queensland*, (3rd ed., 1990), pp. 53-55. This notorious fact largely explains why these days in land sales the "expectation is strong that the parties do not intend to be bound until formal contract is executed" … Exceptionally, the conduct of the parties may reveal an intention to make a binding agreement concerning land before a formal contract is signed … *South Coast Oils (Qld and N.S.W.) Pty Ltd v. Look Enterprises Pty Ltd* [1988] 1 Qd.R. 680 and *Freedom v. A.H.R. Constructions Pty Ltd* [1987] 1 Qd.R. 59 afford recent examples of dispositions of interests in land where uncommon facts established that arrangements short of a formal contract were intended to bind immediately. However, such cases are rare."

[16] The appellants placed reliance on the decisions of the High Court in *Niesmann v Collingridge* (1921) 29 CLR 177, 180-2, 184-5 and *Godecke v Kirwan* (1973) 129 CLR 629, and referred to McHugh JA's discussion of those cases in *G R Securities* (pp 634-5). While those cases are obviously relevant as instances of binding agreements absent executed contracts, they do not relieve the court in this case of the need to analyse all of the relevant circumstances to determine objectively whether such an agreement had crystallized. The facts of those cases are not identical with those of the present, and are distinguishable on various bases.

[17] The first ground of appeal cannot be sustained.

[18] The second ground challenged Her Honour's reliance on the seven additional features listed in para [29] of her reasons for judgment. I deal with each of those matters in turn.

(a) "[T]he lack of identification in numbered paragraph 4 of the letter of 22 August 2003 of the ancillary property to be sold with the land."

The appellants submitted there was no suggestion of any doubt as to the identity of that "ancillary property". That may be, but it is nevertheless fair to observe that the property referred to in para 4 of the letter of 22 August 2003 is quite generally described.

It is also significant, as pointed out for the respondent, that in the draft contract submitted on 29 September 2003, the solicitors for the respondent needed to delete lots which had already been sold, though included in the draft contract submitted on 25 August 2003. That is consistent with the view that by that stage the parties were still involved in a process of negotiation. In other words, the position advanced by

Mr Keane QC for the appellants, that it had been a case of mere misdescription (on 25 August), was not the only view arguably open. Another theoretical possibility is that the parties had not been ad idem as to the identity of the "en globo" land referred to in para 1 of the letter of 22 August 2003. Mr Keane submitted there was no "conceptual uncertainty" about the reference, in para 1 of the letter of 22 August 2003, to "the en globo land at Spring Mountain". The more direct consideration is whether the parties intended to be bound, where the description of the property to be sold would be left in that very general state (cf. *Toyota Motor Corp Aust Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106, 130-1).

(b) "[T]he letter of 22 August 2003 did not specify that the applicants required a binding acceptance of the offer before 10am on 29 August 2003, but merely indicated that the offer could be withdrawn after that time."

The appellants emphasized their wanting an answer by 10 am on 29 August, with other sales in the offing, and submitted that reserving the right to withdraw the offer after 29 August 2003 carried the implication that acceptance before that time would result in an immediately binding agreement. But that is not necessarily so. Another view is that the appellants were thereby simply putting commercial pressure on the respondent to finalize negotiations (or as put by Mr O'Donnell QC for the respondent, "to achieve consensus on the broad terms"), and to proceed to the signing of a formal detailed contract, it being intended that only at that later point would the parties be bound.

(c) "[I]t was contemplated that signing of the draft contract to be submitted on behalf of the purchaser would be a method of acceptance of the offer."

The appellants submitted that the contemplated signing of a draft contract was but one way of accepting the offer. Another, they would submit, was direct acceptance as effected by the fax of 29 August 2003.

It is important to note para 7 of the letter of 22 August 2003:

> "We will forward you a signed contract (with guarantees) early next week as a token of our commitment to purchase. This contract is capable of acceptance by MTAA, alternatively, we are prepared to negotiate in good faith the terms of the contract or use the Association's solicitor's contract."

It is clear that in referring to "This contract", Mr Phillips, the author of that letter, must have had in mind the signed contract to be forwarded. (The letter of 22 August contained an offer, not a "contract".) Accordingly, that constituted a powerful indication that the appellants intended to be bound only upon the execution of a formal contract.

(d) "[T]he forwarding of the draft contract on 25 August 2003 was described as "a token of the preparedness to be bound to purchase" which was unnecessary if the offer was intended to be capable of producing a legally binding contract upon acceptance."

The appellant submitted that the forwarding of the draft contract on 25 August 2003 was an affirmation of the appellants' willingness immediately to be bound upon acceptance of the offer regardless of execution of a contract. On the contrary, however, as submitted for the respondent,

> "… the delivery by the appellants to the respondent of a detailed contract, containing 11 pages of a (sic) special conditions, apparently prepared by solicitors, signed by the second appellant and containing a place for signing by the respondent is clear evidence that the appellant intended that there be no binding contract until such a document was signed by both parties. The subsequent conduct of the appellants and their solicitors supports that contention."

That "subsequent conduct" included the communications between the parties through their solicitors between 29 August 2003 and 3 October 2003 which, as appears from the facts set out above, contain many references to a "proposed" contract, and an assertion that the second appellant was "considering" purchasing the property, that being consistent with the pendency of negotiations, rather than the existence of an already concluded agreement.

(e) "[T]he eagerness with which the applicants sought to have a formal contract executed."

The appellants relate that "eagerness" more to acceptance of the offer of 22 August 2003. But Her Honour's view was in my view reasonably open: the appellants were eager, relevantly, to have a transaction finalized, and there is strong indication that they intended it be finalized by the execution of a contract in the usual way.

(f) "[T]he provision of the guarantees from the proposed guarantors was an important part of the offer and it is unlikely that the parties intended to be bound to the transaction without those guarantees being provided."

The appellants refer to a contractual obligation to provide the guarantees which would have arisen upon acceptance of the offer of 22 August 2003. But Her Honour's point remains valid. The respondent would ordinarily have been astute to ensure that before it became bound, the guarantees it desired were reasonably secure. Accordingly, one sees the guarantees as a schedule to the draft contract, and they refer to the obligations of the second appellant under that contract. In the letter of 22 August 2003, the reference went no further than to "appropriate personal guarantees", which was vague in the context of a contention that acceptance of the offer of 22 August 2003 would give rise to an immediately binding agreement.

(g) "[T]he extent of the matters to be covered in the formal contract document."

The appellant submitted there was no basis for thinking the matters to be included would surpass "conventional conveyancing matters".

But as pointed out for the respondent, the amended draft contract did include other terms, such as conditions which rendered the contract subject to satisfaction by the second appellant with due diligence (a matter covered only very generally in para 2 of the letter of 22 August 2003), obligations upon the respondent to assist the second appellant in its enquiries, varied standard Land Tax provisions, warranties by the respondent in relation to use of the property under the town planning scheme, and provisions relating to the sale of intellectual property.

[19] Her Honour was in my view entitled to rely on each of those matters (a) to (g) as being relevant to the determination of the issue. No doubt they were of varying significance. But they were all nevertheless relevant, and the aggregation of them, taken with the matters already canvassed in relation to the first ground of appeal, provides ample justification for Her Honour's conclusion that no binding contract arose. The second ground of appeal was not sustained.

[20] The respondent raised other matters, as to correspondence between the purported acceptance and the offer, as to whether essential terms had been agreed, and as to other matters of certainty, for example, but it is not necessary to canvass those issues. The question of duty under the *Duties Act* 2001 (Qld) likewise obviously need not be pursued.

[21] The appeal should in my view be dismissed, with costs to be assessed.

[22] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of the Chief Justice and I agree with them and with the conclusion he has reached. However, because of the importance of issues raised during argument it is desirable that I articulate my reasons for reaching that conclusion. I will not repeat herein factual matters fully addressed in the reasons for judgment of the Chief Justice.

[23] The contention of the appellants is that a binding contract for the sale of land came into existence on 29 August 2003 when the respondent sent a fax to the first appellant indicating it "agreed to accept your offer", being the offer contained in the letter of 22 August. The draft minutes of order handed to this court indicate that what is sought by the order for specific performance is that the respondent execute the contract of sale between the second appellant and the respondent, said to be executed by the second appellant, and being exhibit JSH12 to the affidavit of Jonathan Shaw filed on 30 October 2003.

[24] Material in the record book discloses that the second appellant was incorporated on 26 June 2003 and that Robert Ellis Phillips is the sole director and secretary of the company. The material does not disclose that any other person, in particular Richard Scheinberg, is a director. The document JSH12 is not on its face executed by or on behalf of the second appellant, though the second appellant is named therein as the purchaser. At the place where execution by the purchaser would normally be evidenced there is only a signature by Richard Scheinberg. That person has also executed the guarantee which is annexed to the contract, and it is by comparison with that signature that one can say that Richard Scheinberg alone has signed at the place where ordinarily one would find execution by or on behalf of the purchaser. It therefore seems to me that, notwithstanding the assertion in the affidavit, and the draft minutes of order, the document in question has not been duly executed by the second appellant.

[25] The contract document which accompanied the letter of 25 August was signed by Robert Phillips and that would appear to be sufficient execution on behalf of the second appellant: s 127(1)(c) of the *Corporations Act* 2001.

[26] The principal submission of senior counsel for the appellants was that, following *Niesmann v Collingridge* (1921) 29 CLR 177, the fax of 29 August concluded a contract between the first appellant and the respondent in terms of the offer of 22

August, and it was an implied term of that contract "that each side was obliged then to proceed to execute the contract between Robphil and the respondent." Counsel took up the words of McHugh JA in *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 635: "… each party was obliged to do all that was necessary on his part to enable the other party to have the benefit of the agreement concluded by the correspondence. … This included doing everything necessary to enable contracts to be exchanged … . If the parties agreed on additional terms, they would be added to the formal contract. If they did not, the formal contract would give effect only to the agreed terms and conditions of the correspondence."

[27] To my mind the following matters indicate that it was not the intention of the parties to be immediately bound by the acceptance of the offer contained in the document of 22 August. Alternatively, it was certainly not the intention of the respondent to be immediately so bound. Further, subsequent negotiations between the parties led to a situation where any contract to be executed consequent upon an agreement resulting from the acceptance of the offer contained in the document of 22 August would contain terms materially different from the terms of that offer and the respondent has not agreed to those terms.

[28] It is clear from the document of 22 August that the offer, in so far as it related to land, was an offer to purchase "the en globo land at Spring Mountain", later therein referred to as "all of the undeveloped land held at Spring Mountain". The contract document which accompanied the letter of 25 August contained in Annexure A a description of the land which the appellants obviously then believed was to be included in the sale for a price of $11M; 28 lots were described by reference to title. The respondent's solicitors contended in a letter of 29 September 2003 that some of the land described therein was not part of the "en globo land", and further that the title to one lot therein had been cancelled and replaced by another title covering a somewhat smaller area of land. That meant that 11 lots described in the contract of 25 August should be deleted and an amended reference made to another parcel. Those amendments were apparently acceptable to the appellants, without reduction in the purchase price of $11M, and the description of the lands the subject of the sale evidenced by the document JSH12 was in accordance with the contention of the respondent's solicitors.

[29] Senior counsel for the appellants submitted that the reference in the offer of 22 August to the "en globo land" was certain and identifiable, and the purchaser was bound to take what was reasonably ascertained to be meant by the expression. The submission cannot be sustained. Where there was such a discrepancy between what the appellants believed as at 25 August to be the subject lands, and what ultimately transpired to be the lands the respondent could convey, there was no contractual certainty until the subject land had been identified. Particularly where a purchase price of $11M was involved it could not have been the intention of the parties to be contractually bound before the land was identified with greater certainty.

[30] But land was not the only subject matter of the offer contained in the offer of 22 August. It also referred to ancillary property being "plans, data, brand names, trade marks, intellectual property, approvals, consultants' reports, valuations, estate signage agreements, promotional material, and any bonds or contribution credits" with Beaudesert Shire Council.

[31] Clause 36.1 of the contract document submitted on 25 August provided that the "Vendor must provide the Purchaser with copies of the Vendor's Reports and details and/or copies of the Property within 7 days of the Contract Date". Vendor's Reports were defined in Clause 35.1 thereof to mean "all those consultant reports and valuations commissioned by the Vendor or on behalf of the Vendor or in the possession or control of the Vendor, on or before the Contract Date in relation to the development of the Land". Clauses 41.1 and 43.1 thereof amended clause 7.7 of the standard form so that the vendor was obligated to produce within 14 days to the purchaser "any Licences and Intellectual Property" relating to the subject property. Those terms were also extensively defined in clause 35.1. It is immediately obvious that the terms on which the appellants wished to enter into a contract with the respondent materially differed from the description of the subject matter set out in the offer of 22 August.

[32] Many of the provisions in the contract document of 25 August were not acceptable to the respondent and were the subject of correspondence between the parties. Ultimately the document JSH12 deleted the definition of Vendor's Reports and any obligation on the vendor to provide reports, deleted the definition of Licences and any obligation on the vendor to produce licences, and significantly amended the definition of what was included in the term Intellectual Property.

[33] Again it is my view that there was no certainty as to the description of ancillary property the subject of the offer of 22 August, and that it was the clear intention of the parties that there would be further negotiations with respect to that subject matter before a formal contract was entered into.

[34] Paragraph 3 of the document of 22 August indicated that the ultimate contract of purchase with the unnamed purchaser would be supported by "appropriate personal guarantees". The document is silent as to what would constitute such a guarantee. Could either party dictate the terms of such a guarantee or was that something to be negotiated? Further, who were to be the guarantors? Four people were named in that paragraph as being the owners and controllers of the intended purchaser, but it is not clear whether they were to be the guarantors; was the vendor obliged to accept other persons as guarantors, were all four named therein to be guarantors or would only some of them suffice? In the contract document accompanying the letter of 25 August there was a guarantee annexed executed by David Scheinberg, Richard Scheinberg and Robert Phillips. Interestingly there was no guarantee from Justin Scheinberg, though he was a witness to the signature of each of the three guarantors. That was also the position with the document JSH12 save that Justin Scheinberg was not the witness.

[35] Particularly where no details of the purchaser company were provided in the offer of 22 August the matter of personal guarantees would undoubtedly have been a matter of major concern to any vendor and that, to my mind, is a further indication that the parties did not intend to be bound immediately upon an acceptance of that offer. Given the magnitude of the transaction, and its complexity, it is clear that further matters had to be negotiated and agreed upon before a binding contract came into existence.

[36] In paragraph 7 of the offer of 22 August there was reference to the contract becoming "unconditional upon due diligence", but there was nothing to indicate what was encompassed by the expression "due diligence". In particular there was nothing to indicate what obligations, if any, were thereby imposed upon the respondent. It is sufficient to record that in clauses 36, 37 and 39 of the contract document of 25 August there were express provisions with respect to due diligence imposing obligations upon the respondent. They included an obligation to provide reports and permit the purchaser to carry out inspections on the land and to "do anything required for or incidental to any application contemplated under this Contract, including but not limited to conducting Due Diligence Investigations." The document also spelt out details of the due diligence period and the purchaser's rights and obligations with respect thereto. Those provisions were restated with some minor modifications in the document JSH12.

[37] It is clear that the due diligence procedure was of critical importance to the purchaser and to my mind it is clear that the intention of the parties was that there should be no binding contract of sale until the due diligence rights and obligations had been defined and accepted by the parties. Some indication that was the view of the appellants can be seen in the solicitor's letter of 29 August wherein it was said "my client wishes to proceed to execution of the contract as soon as possible to enable the due diligence process to proceed. Would you please let me have your comments in relation to the contract as soon as possible."

[38] In the offer of 22 August it was said that a signed contract would be forwarded "early next week as a token of our commitment to purchase" and then that that "contract is capable of acceptance by MTAA, alternatively, we are prepared to negotiate in good faith the terms of the contract or use the Association's solicitor's contract." A statement to similar effect was made in the letter of 25 August; therein it was said that the purchaser had "tried to make the contract as uncontroversial as possible but we are willing to negotiate the terms of this contract or your solicitor's contract as required". Those expressions have to be read in the light of the statement in each of the documents that the offer was "firm" or "open for acceptance" until 10am Friday 29 August after "which it may be withdrawn at any time without notice". In the letter of 25 August that was said to be dependent "upon our success in acquiring one of two other properties".

[39] In my view the submission of senior counsel for the respondent as to the effect of those statements should be accepted. He contended that the offer should be seen "as a broad proposal to see if consensus could be achieved on the general points before deciding whether it was worthwhile descending into working out the contractual detail". If that "broad consensus" was not reached by 29 August, the offer could be withdrawn at any time at the discretion of the offeror. The recognition in each of the documents of 22 and 25 August that either there could be acceptance of the contract document of 25 August or negotiation in good faith, demonstrates to my mind that it was not the intention of the parties that the offer of 22 August could be accepted giving rise to an immediately binding contract between the parties. The response of the respondent on 29 August was no more than an indication that the respondent was prepared to negotiate in good faith the terms of a contract of sale. There was no acceptance by the respondent of the contract document of 25 August.

[40] Given the wording of paragraph 7 of the offer of 22 August and the wording of the letter of 25 August there is a strong argument in favour of the proposition that the material forwarded to the respondent on 25 August constituted a more specific offer which displaced the offer of 22 August. If that be so then it would clearly follow that it was not the intention that thereafter the offer of 22 August could be accepted resulting in an immediately binding contract between the parties. But as the learned judge at first instance did not proceed on the basis that the material of 25 August displaced the earlier offer it is not necessary to arrive at a definitive conclusion on that issue.

[41] Subsequent correspondence dealing with the issues raised by the documents of 22 August, 25 August and 29 August use expressions such as "move to finalise the contract", "proposed contract", and "proposed sale". The tenor of that correspondence suggests that it was recognised there was no legally binding contract of sale capable of immediate enforcement resulting from the fax of 29 August.

[42] As already said, I agree with the reasons of the Chief Justice. The appeal should be dismissed with costs to be assessed.

[43] **MACKENZIE J:** After a short hearing in the Trial Division, with limited cross-examination on one deponent's affidavit, an order for specific performance sought by the first and second appellants in respect of an alleged agreement for the sale of parcels of land at Spring Mountain was refused. The underlying issue is whether the learned trial judge was correct in holding that there was not a concluded contract between either of the appellants and the respondent.

[44] To understand the nature of the arguments it is necessary to go into some detail concerning the dealings between the parties. The starting point is a letter dated 22 August 2003 sent by Mr Phillips in his capacity as director of the first appellant to the respondent. It contained an offer to purchase "the en globo land at Spring Mountain". The property to be purchased was described as all of the undeveloped land held at Spring Mountain, plans, data, brand names, trademarks, intellectual property, approvals, consultants reports, valuations, estate signage agreements, promotional material, and any bonds or contribution credits with the Beaudesert Shire Council. The purchaser was to be a special purpose vehicle owned and controlled by Mr Phillips and Messrs David, Richard and Justin Scheinberg. "[A]ppropriate personal guarantees" were offered. The offer was said to be "firm until 10am on Friday 29 August after which it may be withdrawn at any time without notice".

[45] The letter also stated as follows:

> "We will forward you a signed contract (with guarantees) early next week as a token of our commitment to purchase. This contract is capable of acceptance by MTAA, alternatively, we are prepared to negotiate in good faith the terms of the contract or use the Association's solicitor's contract."

[46] On 25 August 2003 Mr Phillips sent, under the letterhead of the first appellant, a draft contract in REIQ format showing the respondent as vendor and the second appellant as purchaser. On the contract, the signature of Mr Phillips appears where

the purchaser was to sign. The letter stated that the contract was submitted as "a token of our preparedness to be bound to purchase". This was said to be evidenced by personal guarantees signed by Mr Phillips, David Scheinberg and Richard Scheinberg (but not Justin Scheinberg). On the face of an ASIC extract relevant to the second appellant the company was registered on 26 June 2003 and Mr Phillips was the sole director and secretary on that date.

[47] The respondent is a subsidiary of the Motor Trades Association of Australia Superannuation Fund Pty Ltd (MTAA Super). MTAA Limited (MTAA) provides administrative support for MTAA Super. MTAA Super is trustee of MTAA Superannuation Fund. Mr Kochel, Executive Officer (Property and Insurance) of MTAA was involved in negotiations with Mr Phillips. Soon after receiving the letter of 22 August 2003 he sought advice from accountants about the GST situation. There were a number of conversations on 27 and 28 August, in the course of one of which, according to Mr Kochel, GST liability, and in particular the need for revaluation as at July 2000 instead of relying on a June 2000 valuation was raised with Mr Phillips. According to Mr Kochel the conversation concluded with Mr Phillips saying he would confirm payment of GST (which was apparently of the order of $650,000). Late on 28 August 2003 there was an email from Mr Phillips putting "on record" that his interests would pay the purchase price and the amount of GST that the respondent was required to pay "based on your June 2000 valuation of approx. $4.5m". Mr Kochel deposed that that was inconsistent with the discussion he had with Mr Phillips. Mr Kochel was not required for cross-examination.

[48] Mr Phillips' version of the conversation was that Mr Kochel had asked him to confirm that the purchaser would pay GST based on the June 2000 valuation which Mr Phillips confirmed. He sent an email confirming that information. In cross-examination at the hearing Mr Phillips' evidence was a little confusing on the issue but he accepted that July 2000 had been mentioned. He believed the margin scheme concerning GST required the valuation to be taken from then. Nevertheless, his evidence was that Mr Kochel said that the June 2000 valuation was to be used. The learned trial judge addressed the issue in her reasons. She observed that the email of 28 August 2003 supported Mr Phillips' understanding of the conversation but said that that did not mean that his understanding was correct. She also observed that, because Mr Kochel had sought accountants' advice, it was likely he would have been accurate in conveying the relevant effect to Mr Phillips.

[49] Then on 29 August 2003 a fax was sent by Mr Delaney, Director, Principal Executive Officer and Secretary of MTAA Super containing the following:

> "As discussed with George Kochel of my Office, I write now to confirm that the MTAA Superannuation Fund has considered your letter of offer of 22 August for the purchase of Spring Mountain Estate. In the result the Trustee has agreed to accept your offer of $11 million plus GST on the terms that you have proposed.
>
> In that connection, I would be grateful if you could provide me with a list of the due diligence information that you require. Upon your receipt of the information MTAA will grant a 30 day exclusive due diligence period."

[50] Later that day Mr Phillips emailed Mr Kochel referring to the fax and a phone call from Mr Kochel that morning. The communication included the following:

> "I will arrange for our solicitor to get to your solicitor, hopefully today, a list of the due diligence information that is needed from MTAA. I understand that our respective solicitors will now move finalise *(sic)* the contract. As you will appreciate, we need to have the contract signed so that we can commit to the expenditure of the due diligence process."

[51] On 29 August 2003 the appellants' solicitors advised the respondent's solicitors as follows:

> "I confirm that my client wishes to proceed to execution of the contract as soon as possible to enable the due diligence process to proceed. Would you please let me have your comments in relation to the contract as soon as possible. I confirm that it has already been agreed between the parties that the margin scheme clause will be amended to provide that the purchaser must accept the Vendor's valuation of the property as at 1 July 2000. I will submit an amended margin scheme clause for your consideration."

[52] On 4 September 2003 a draft contract and the deposit were forwarded to the respondent's solicitors. The letter concluded:

> "We look forward to receiving your comments in relation to the proposed contract as soon as possible."

[53] By 15 September 2003 due diligence was well advanced but Mr Phillips' email of that date asked Mr Kochel if he could expedite the process between the solicitors because it seemed to be taking a long time.

[54] On 29 September 2003 a draft contract, amended in several respects, was sent by the respondent's solicitors to the appellants' solicitors. The most striking change was that a significant number of parcels of land included in the annexure to the contract tendered by the applicants on 22 August 2003 were omitted because they were not part of the en globo parcel. Even then, the solicitor was waiting for confirmation that the list was accurate. The provisions with regard to GST were also substantially amended to reflect a valuation on 1 July 2000 being used and the new provisions were made under the heading "state of property".

[55] On 30 September 2003 a copy of a contract apparently signed by Richard Scheinberg on behalf of the purchaser was returned to the respondent's solicitors. Guarantees signed by David Scheinberg, Richard Scheinberg and Mr Phillips but none by Justin Scheinberg were attached. The same day, Mr Dempsey wrote advising Mr Phillips that the proposed contract would be put before the trustee at a meeting on 2 October 2003 for its consideration.

[56] On 3 October 2003 the appellants' solicitor replied, with reference to the letter dated 29 August 2003 in the following terms:

> "We refer to the letter from MTAA to our client dated 29 August 2003 in which your client accepted our client's offer to purchase the Spring Mountain Estate.

> Our client has accepted and has signed and delivered the contract in the form required by your client together with the full 10% deposit. (We note that the contract will become the record of the formal agreement between the parties in place of the earlier agreement recorded by your client's letter of 29 August 2003.)
>
> We advise that our client has now completed its due diligence investigations and is satisfied with those investigations and that the agreement of 29 August, 2003 is therefore unconditional in that respect. (For the purposes of clause 36.4 of the formal agreement, our client gives notice that special condition 36 is satisfied.)
>
> We also confirm our client is satisfied with the description of the land described in Annexure A.
>
> Settlement is to occur 45 days after satisfaction of the due diligence condition. Accordingly, we note settlement is required on 17 November 2003.
>
> We will submit transfer documents shortly."

[57] Also on 3 October 2003 the solicitors for the respondent advised that the trustee did not approve the proposed sale and had decided to reserve its position and to consider all its circumstances in relation to the assets. It was stated that in the event that at some future time the trustee decided to market the estate for sale, the appellants would be notified. That letter produced a further response from the solicitors for the appellants stating that an agreement for sale of the property existed and that the statement that the trustee did not approve the proposed sale was a repudiation of the agreement. The letter said that their client affirmed the agreement and required the respondent to perform it.

[58] The learned trial judge said that the main issue was whether a binding contract came into effect on 29 August 2003 when the fax was received from Mr Dempsey. The learned trial judge said that there was an alternative claim for specific performance on the basis that an agreement for sale was entered into on or about 29 September 2003 when the respondent's solicitors returned to the second appellant's solicitors the amended contract. She observed that that aspect of the claim could not succeed because there was no basis for concluding that the solicitor for the respondent had any express or implied authority to contract on behalf of the respondent since the solicitor was acting as town agent for the respondent's solicitors in New South Wales, with express instructions to refer all matters to those solicitors.

[59] She identified nine matters in favour of finding that the parties had reached a binding agreement on 29 August 2003 and seven, apart from the size and nature of the transaction, suggesting that the parties did not intend to be bound upon the sending of the letter of 29 August 2003. The learned trial judge referred to *Masters v Cameron* (1954) 91 CLR 353 at 360 saying that according to the second appellant the transaction fell into the second of the three classes referred to in that authority, or into a category recognised in *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310, 317, that is to say one in which the parties were content to be bound immediately and exclusively by the terms they had agreed upon while expecting to

make a further contract in substitution for the first contract containing, by consent, additional terms. She also had regard to a passage from *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, 634 where, amongst other things, McHugh JA identified the nature of the process of discerning the intention of the parties. In the course of doing so he referred to the magnitude of the transaction or its complexity as possible elements in deciding whether the parties intended to be immediately bound.

[60] In my view it misreads the learned trial judge's reasons to suggest, as the first ground of appeal appears to, that she placed undue weight on those factors to the exclusion of other relevant factors or treated them as a presumption against a contract. She clearly recognised that it was the "weight and balance" of the several factors for and against existence of the contract that were critical.

[61] Nevertheless there was another aspect to the first ground of appeal, that this was a case where the correspondence passing between the parties was in terms that indicated that they intended to be bound immediately. In support of the argument the appellants submitted that the references in the letters of 22 and 25 August 2003 to the offer being firm until 29 August 2003 and that it may thereafter be withdrawn without notice were to be construed as communication of the proposition that if the vendor accepted on or before 29 August 2003, the offeror would be bound by its acceptance. The communication of 29 August 2003 from Mr Dempsey was an unequivocal acceptance.

[62] Particular reliance was placed on *Niesmann v Collingridge* (1921) 29 CLR 177 and *Godecke v Kirwin* (1973) 129 CLR 629. In the former, particular emphasis was placed on the use of the words "firm offer", statement of all essential terms of the bargain in the offer and the absence of any words introducing any contingency even though signing of a formal contract was contemplated. *Godecke v Kirwin* was also a case where there was particularity of terms and a document described as an offer and acceptance. While there was provision for signing a contract and for the addition of other reasonably required covenants and conditions, it was held that the terms were not too uncertain to constitute a binding contract and did not indicate that the parties did not intend that they should be bound in any way unless and until a formal contract had been executed.

[63] Those two authorities should be regarded as examples where a conjunction of particular circumstances led to the conclusion reached rather than cases from which any universal principle can be drawn. Statements in *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521, 527-528 support the conclusion that the answer whether the parties intended to be immediately bound existed is to be found in the whole of the circumstances of the case.

[64] There is nothing to indicate that the learned trial judge misconstrued the authorities upon which she relied nor that she wrongly elevated the notion of the magnitude and nature of the transaction as a relevant factor beyond its appropriate level. There is no substance in the first ground relied on by the appellants.

[65] The second ground of appeal is that the learned trial judge erred in relying on seven factors which she described as indicia that the parties did not intend to be legally bound upon sending the letter of 29 August 2003, to reach a conclusion that the first

appellant and the respondent did not intend to be bound by the correspondence of 22 to 29 August 2003. I am not persuaded that the learned trial judge's conclusion was wrong. The structure of her judgment indicates that she focused on the matters both in favour and against the conclusion that a contract had been entered into. Particularly with regard to the factors relied on by her as indications against that conclusion, she did not assign a hierarchy of importance to them. One of the difficulties about criticising cogency of the individual factors taken into account by her is that determining the intention of the parties remains an exercise in drawing an inference from a whole range of factors of varying individual strengths. In my view, none of them was irrelevant viewed as individual facts in a circumstantial case.

[66] It is desirable to comment upon the individual criticisms. The amendments made during the process of reaching the final draft of the contract with regard to what is described as property to be purchased show that not all items described as such property existed in the form described. Senior Counsel for the appellants relied on the proposition that these were matters of detail and did not indicate conceptual uncertainty. Nevertheless, the fact that generic descriptions, without achieving precision, were used is not a matter that is irrelevant in what is essentially a circumstantial exercise. The same applies to the fact that the "en globo land" and the "undeveloped land" changed substantially in their content despite reliance on the assertion that the concept was understood as between the parties.

[67] In so far as there was reliance on the contemplation that signing of the draft contract to be submitted on behalf of the purchaser could be a method of acceptance of the offer, this seems to imply that a contract had not yet been formed. It is true as the appellants submitted, that contemplation that this may be one method of acceptance is not inconsistent with acceptance by the letter of 29 August 2003. But it is only one factor in weighing a number of circumstantial facts. In my view it would beg the question if an attempt to convert the appellants' proposition into a positive factor in favour of the appellants' case was made. Similar remarks may be made with regard to the argument addressed in relation to whether forwarding of the draft contract on 25 August 2003 as a token of preparedness to be bound to purchase was an indication that the offer was not intended to be capable of producing a legally binding contract upon acceptance. It was submitted on behalf of the appellants that this was merely an affirmation of willingness to be bound to the draft contract of 25 August 2003, or to the basic terms of the letter of 22 August 2003 with the detail to be negotiated later. Likewise, there may be competing conclusions that are open concerning the emphasis or eagerness placed on having a formal contract executed, but that possibility is also of the essence of most facts in a circumstantial case.

[68] In my view it was open to the learned trial judge to have regard to the fact that not all of those who were put forward as being proposed controllers of the purchaser had offered guarantees, if that is the learned trial judge's focal point in her observation in her reasons. I am not persuaded that, in the context of correspondence which referred to three options, namely accepting the contract tendered on the appellants' behalf or negotiating contractual terms based on that contract or one to be prepared by the respondent's solicitor, the learned trial judge was wrong to include the extent of the matters to be covered in the formal contract document as a relevant circumstantial fact. I do not accept that it is cogent to argue

that only conventional conveyancing matters were contemplated as matters for further negotiation.

[69] Issues involving the relationship between the letters of 22 and 29 August 2003 were raised in submissions in the Trial Division with focus on specific arguments. A more general proposition which is probably inherent in the submissions but not expressed in the way it is expressed below is consistent with my concern about the validity of the appellants' case. For reasons already given, it is my conclusion that there is no substance in the second ground relied on by the appellants. What follows is merely an observation which may be capable of reinforcing the thrust of the case that there was no agreement. The letter of 29 August 2003 relied on as acceptance of the offer, thereby creating a concluded contract, refers to the letter of offer of the 22 August 2003. More particularly it refers to accepting the offer "on the terms … proposed". There is at least some ambiguity in this. The letter of 22 August 2003 refers to an intention to forward the contract the following week (which was effectuated by sending the draft contract on 25 August 2003). The letter of 22 August 2003 refers to the contract being capable of acceptance but also refers to alternatives of negotiating on the basis of that contract in good faith, or using the Association's solicitor's contract. The same options are repeated in the letter of 25 August 2003 accompanying the contract tendered. Where that range of options is presented there is in my view some difficulty about the notion that a somewhat ambiguous response, relied on as an acceptance, resulted in a concluded contract being formed.

[70] In my conclusion neither of the appellants' grounds have been made out and the appeal must be dismissed with costs to be assessed.