SUPREME COURT OF QUEENSLAND

CITATION:	*Mission Development v Rhett* [2004] QSC 359
PARTIES:	**MISSION DEVELOPMENT GROUP PTY LTD ACN 104 027 867** **AS TRUSTEE UNDER INSTRUMENT No 706802317** (applicant) **v** **RHETT PTY LTD ACN 105 466 546** (respondent)
FILE NO/S:	SC No 431 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	21 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2004
JUDGE:	Mackenzie J
ORDER:	**1. The application is dismissed.** **2. Costs are reserved.**
CATCHWORDS:	CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – CAVEATS AGAINST DEALINGS – LAPSE, REMOVAL AND WITHDRAWAL – REMOVAL – where applicant entered into other contracts – where applicant required funds from property in dispute – whether serious issue to be tried – whether on balance of convenience caveat can be set aside TAXES AND DUTIES – STAMP DUTIES – UNSTAMPED AND IMPROPERLY STAMPED DOCUMENTS – QUEENSLAND – where contract to be stamped formed basis of caveat – where multiplicity of issues to be tried - whether failure to stamp is fatal – whether caveat can be removed because failure to stamp *Duties Act* (Qld) 2001, s 487 *Land Title Act* (Qld) 1994, s 127 *Stamp Duties Act* (Qld) 1894, s 4A *Burnitt v Pacific Paradise Resort Pty Ltd* [2004] QDC 218; DC No 1721 of 2004, 19 July 2004, followed *Caxton Street Agencies Pty Ltd v Korkidas* [2002] QSC 210; SC No 1533 of 2002, 28 June 2002, considered

Hoggett v O'Rourke [2000] QSC 387; SC No 11510 of 1999, 2 November 2000, considered

COUNSEL: J Jacobs for the applicant
A P J Collins for the respondent

SOLICITORS: Peter Coumbis for the applicant
Quinn & Scattini for the respondent

[1] **MACKENZIE J:** On 29 August 2003 the applicant grantor and respondent grantee executed a Put and Call option the effect of which was that the respondent grantee was entitled to exercise the Call option between 1 and 8 July 2004. (The "exercise date" in the definitions refers to 8 July 2003 as the end point but it is not in dispute that the relevant date was 8 July 2004). If the Call option was not exercised by 5pm on 8 July 2004 the grantor could, up to 5pm on 15 July 2004, exercise the Put option.

[2] By clause 15, time was expressed to be of the essence of the agreement. Reference will be made to this later. It was not in dispute that there was delay because the grantee pursued town planning issues in connection with the property, of which the grantor was aware. It was common ground that there was a meeting on 17 June 2004 attended by Mr Salter, a director of the applicant, Mr Gulliver, a director of the respondent and an associate of Mr Gulliver's, Mr Peters. On the applicant's version the purpose of the meeting was to discuss the possibility of a new option to run to 31 December 2004. According to Mr Salter he was surprised that Mr Gulliver was accompanied by Mr Peters and resolved not to make any commitment at the meeting. After listening to Mr Gulliver's proposal, he said that he would consider his position and that they could discuss it later.

[3] Mr Salter said that the Call option was not exercised by 5pm on 8 July 2004. Subsequently, there were discussions concerning a new option agreement and a possible joint venture between the applicant and the respondent but no agreement was reached. On 13 July 2004 he met Mr Gulliver and an associate of Mr Gulliver's, Mr Tozer, when the same subjects including an extension to 31 December 2004 were discussed. According to Mr Salter he told Mr Gulliver that he had financial commitments in November and that an extension to 31 December was not possible. However, he would consider the situation.

[4] On the respondent's version, there had been earlier discussions on 19 April 2004 and 24 May 2004 at which an extension of the option period had been discussed. Mr Salter had agreed to extend the option, provided an interest component was paid for the period of extension, at the first meeting and confirmed it at the second. According to Mr Gulliver, Mr Salter said he would get the paperwork done for the extension. He said that on 17 June 2004 Mr Salter had confirmed that an extension to 31 December 2004 had been given but he may wish to bring the period forward to 30 November 2004 to enable other transactions in which he was involved to settle.

[5] There is an affidavit from Mr Tozer deposing that he was at the meeting on 13 July 2004. According to him, Mr Salter said that he was committed to purchasing other property and wanted the purchase by the respondent to be moved forward. The date of 30 November 2004 was discussed and Mr Gulliver was agreeable to that proposal. According to Mr Tozer the context of the meeting suggested to him that

there had been prior agreement to extend the option. He said that Mr Gulliver asked Mr Salter to provide the necessary paper work.

[6] Documents purporting to be file notes and correspondence on both sides reflect their current positions. There is a challenge to the authenticity of one critical letter dated 21 June 2004. The dispute as to the effect of the discussions raises factual issues which are unresolvable on this application. It is apparent that the two versions cannot be reconciled. There is an allegation by the respondent that, to the knowledge of the applicant, the respondent incurred expense on the assumption that an extension had been granted. This is the basis for claims of unconscionable conduct and estoppel against the applicant. There were also issues of whether the extension was merely a variation of the original agreement or a new agreement and as to which *Masters v Cameron* category any such agreement fell into if the respondents' case was accepted. This arose principally in the context of the applicant's reliance on the absence of writing evidencing the extension. The resolution of the factual issues is significantly dependent on findings as to credit of the respective witnesses as to whether there was an agreement for an extension.

[7] The basis of the caveat which the applicant seeks to set aside is stated to be a contract of sale dated 27 August 2004 between the applicant and the respondent. The factual context of this assertion is that there was a further meeting between Mr Salter and Mr Gulliver scheduled for 3 August 2004 which was cancelled by Mr Gulliver because, he said, the builder had not finished the quotations. On 16 August 2004 Mr Salter wrote to Mr Gulliver to the effect that the feasibility and the second option agreement were to be finalised at the meeting which had been cancelled. Since Mr Salter had not received the costings, he assumed that they were not available. Since it was five weeks since the option expired and he was no further advanced on the project he was not prepared to wait any longer. According to Mr Gulliver, this was the first indication he had that Mr Salter considered that there was no agreement to extend the option. According to Mr Gulliver, he had in fact obtained the quotation on the evening of 13 August 2004 and emailed it to Mr Salter on 16 August 2004.

[8] According to Mr Gulliver he had a conversation with Mr Salter the next day which reflected their respective positions, as did correspondence from both sides on 23 August 2004. On 27 August 2004 a notice of exercise of the Call option, based on the alleged agreement to extend the original agreement to 30 November 2004, was delivered by the respondent to the applicant. On 1 September 2004, Mr Salter replied that the only Put and Call option expired on 8 July 2004. No extension or new option had been granted. The respondent lodged the caveat on 30 August 2004.

[9] It is the applicant's case that, if the contract was formed by the exercise of the option, the respondent was in breach of the agreement by failing to settle on or before 27 September 2004. Reliance was placed on the provisions of clause 15 which made time of the essence. The applicant purported to terminate the agreement (without any admission of its existence) by notice to the respondent on the morning of the hearing, 30 September 2004. The notice relies on cl 9.1 of the agreement, which made the agreement subject to and conditional on the grantee conducting due diligence investigations by 1 September 2003. Subsequent clauses related to giving notice of the outcome of such investigations.

[10] From the recitation of the facts and the issues, it is apparent that there is a multiplicity of serious questions to be tried. However, the applicant relies on the failure to settle when, it says, time was of the essence, and its subsequent notice of termination, as fundamental obstacles to the respondent maintaining the caveat. One of the difficulties about this proposition, it seems to me, is that there is a latent question of whether the requirement for notice as to the outcome of the due diligence inquiry and the provision as to time being of the essence survived the circumstances outlined above, where there were subsequent negotiations notwithstanding the fact that neither the Call option nor the Put option had been exercised. It is possible for a party to a contract, by conduct or words, to waive the benefit of a provision in its favour, including one that time is of the essence. If this occurs the provision ceases entirely to be applicable in favour of the party who waives the benefit. There is at least a serious question to be tried in this regard on the facts.

[11] The applicant also relies on non-stamping, at the time of the hearing, of the contract relied on by the respondent as the foundation of the caveat. At the hearing the respondent offered an undertaking to stamp the contract. Nevertheless, the applicant relied on two decisions of Holmes J, one on s 4A of the *Stamp Duties Act* 1894 and the other on s 487 of the *Duties Act* 2001, *Hoggett v O'Rourke* [2000] QSC 387 and *Caxton Street Agencies Pty Ltd v Korkidas* [2002] QSC 210 in support of the argument that an undertaking to stamp was ineffective in the face of s 487.

[12] On the other hand, the respondent relied on *Burnitt v Pacific Paradise Resort Pty Ltd* [2004] QDC 218, where Judge McGill conducted an extensive analysis of authority and expressly disagreed (albeit obiter) with the conclusion reached in *Hoggett* and in *Caxton*.

[13] The relevant relief sought in the originating application is a declaration that the respondent is not entitled to maintain the caveat and that the caveat be removed pursuant to s 127 of the *Land Title Act* 1994. In a case where the question of non-payment of duty is not an issue, and leaving aside questions of balance of convenience, for an applicant to succeed in a summary way it must demonstrate that there are no serious questions to be tried concerning the existence or otherwise of the contract upon which the caveat registered on the Land Title Register relies. In this case there are diametrically opposed versions of what happened at meetings critical to the existence of the contract.

[14] The onus is on the applicant to demonstrate that it is entitled to the relief sought. If it fails to do so, the application to set aside fails and the matter must go to trial. Unless the onus is discharged the caveat duly registered remains on the register until the issues in dispute are determined at the trial. Notwithstanding what was said in *Caxton* and in *Hoggett*, I respectfully adopt the thrust of the methodology and analysis of McGill DCJ in *Burnitt* in respect of these kinds of issues in matters of related kinds to the present matter. As a result, I am not persuaded that in this case, where a multiplicity of issues need to be tried, failure to stamp the contract forming the basis for the registered caveat is fatal at this point. By the time the matter comes to be heard at trial, in light of the undertaking given it is plain there is a potentiality for the point to become of no consequence. Insofar as the application relies on failure to stamp, it must fail.

[15] In support of the proposition that there were factors bearing on the balance of convenience, the applicant relied on the fact that it had entered into other contracts and required funds from the present transaction to settle them and that the respondent was not in a position to settle in any event. The latter proposition depends on the mere absence of evidence that an offer of finance made by a financial institution had been accepted by the respondent. Chronologically, one contract was entered into on 25 May 2004 with the settlement date 4 October 2004. The second describes the purchaser as "John Salter or nominee". There is a bare assertion in Mr Salter's affidavit that the applicant entered into the contract which appears to have been formed on 12 August 2004 with the settlement date of 8 November 2004. Another was dated 7 September 2004 with the settlement date 60 days from that date. Given the chronology of events, I am not persuaded that entering into at least two of the contracts at a time when it was apparent that there was likely to be a dispute is a cogent balance of convenience reason for setting aside the caveat. In addition, the only undertaking that Mr Salter could give (on the assumption that he had authority to do so on behalf of the applicant) was that the assets of the applicant would be maintained at the current level. I do not think that there is any balance of convenience in favour of setting aside the caveat.

[16] In the result the application is dismissed. With regard to costs, I intend to reserve costs since, in the event that the applicant is ultimately successful on issues which involve credibility, it would be unjust to order it to pay costs in respect of the present application. If the respondent is ultimately successful there is no reason why costs of this application should not follow the event. I would simply add that these reasons have been prepared promptly on my return from a short period of leave with a view to giving the parties a result having regard to the need to resolve commercial matters expeditiously. If either party wishes, for the purpose of taking the matter further, to have detailed elaboration of the reasons for adopting the methodology of Judge McGill they may apply to me through my Associate for more detailed reasons in that regard. If the parties agree on directions to progress the matter expeditiously, I will initial a draft signed by the parties. If there is no agreement, the matter will have to be resolved by an Applications judge.

[17] The orders are as follows:

1. The application is dismissed.
2. Costs are reserved.