SUPREME COURT OF QUEENSLAND

CITATION:	*JV Property Syndicates P/L v Croakybill Ltd* [2005] QCA 479
PARTIES:	**JV PROPERTY SYNDICATES PTY LTD** ACN 050 921 036 (plaintiff/appellant) **v** **CROAKYBILL LIMITED** (defendant/respondent)
FILE NO/S:	Appeal No 6486 of 2005 SC No 3121 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2005
JUDGES:	de Jersey CJ, McPherson JA and Mackenzie J Separate reasons for judgment of each member of the Court, de Jersey CJ and Mackenzie J concurring as to the orders made, McPherson JA dissenting
ORDERS:	**1. Appeal dismissed** **2. The appellant pay the respondent's costs, to be assessed**
CATCHWORDS:	CONTRACTS – PARTICULAR PARTIES – VENDOR AND PURCHASER – ASSIGNMENT OF CONTRACT – BY PURCHASER – where the respondent granted grantee a call option to purchase property by deed – where grantee purported to assign the benefit of the deed to the appellant – where the deed stated that "[i]f this Deed is assigned the grantee will obtain a covenant from the assignee to be bound by this Deed" – where this did not occur because the respondent was not a party to the deed – where the appellant purported to exercise the call option – where the respondent refused to sell the property – whether there must have been strict compliance with the specified requirements for the assignment to be effective – whether the conditions for assignment were conditions precedent or conditions subsequent – whether the benefit of the deed was effectively assigned – whether the appellant was entitled to exercise the call option

Property Law Act 1974 (Qld), s 199

Australian Woollen Mills Pty Ltd v Commonwealth (1954) 92 CLR 424, cited
Brien v Dwyer (1978) 141 CLR 378, considered
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256, considered
Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57, cited
Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85, cited
London & S W Railway Co v Gomm (1882) 20 Ch D 562, cited
Millichamp v Jones [1982] 1 WLR 1422, considered
New Zealand Factors Ltd v Farmers Trading Co Ltd [1992] 3 NZLR 703, considered
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, considered
Rushton (SA) Pty Ltd & Ors v Holzberger & Ors [2003] QCA 106; [2003] ANZ ConvR 316, cited
Thomas v National Australia Bank Ltd [1999] QCA 525; [2000] 2 Qd R 448, cited
Tito v Waddell (No 2) [1977] Ch 106, considered
Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660, cited
United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 All ER 104, cited
United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904, considered
William Brandt's Sons & Co v Dunlop Rubber Co Ltd [1905] AC 454, ctied

COUNSEL: J D McKenna SC, with M Taylor, for the appellant
S Couper QC for the respondent

SOLICITORS: Flower & Hart for the appellant
Home Wilkinson Lowry for the respondent

[1] **de JERSEY CJ**: The appellant ("JV") brought a proceeding in which it claimed specific performance of an agreement for the sale of property at Rockhampton, said to have crystallized upon the exercise of an option. JV claimed to have taken an assignment from the original grantee of that option (Citimark Properties Pty Ltd – "Citimark"). Whether the sale agreement arose depended not on the manner of exercise of the option, but on the effectiveness of the assignment. The pleadings established the validity of the assignment as an issue warranting separate, early determination.

[2] The learned primary Judge held that the benefit of the deed containing the option had not been effectively assigned to JV, so that JV was not entitled to exercise the option. He consequently dismissed JV's proceeding. JV challenges His Honour's conclusions, and to that end, his construction (and characterization) of the agreement containing the option.

[3] That agreement comprised a deed dated 12 October 2004, by which the respondent ("Croakybill"), as "owner", granted to Citimark, as "grantee", the ("call") option to purchase the land (cl 3) on the terms set out in a contract in a schedule to the deed. The land was not by then the subject of a separate certificate of title. The option was to lapse 21 days after JV had given notice to Citimark of the issue of a certificate of title for the proposed lot.

[4] The deed also provided (cl 7) for a put option. Croakybill was accorded the right to require Citimark to purchase the proposed lot on the terms set out in the contract scheduled to the deed. Croakybill acknowledged that the put option could not be exercised if the call option were exercised.

[5] By cl 13 of the deed, Citimark was permitted to enter the land and carry out surveys, tests, investigations etc, causing the owner the least disturbance possible, and restoring the property when finished. Citimark was obliged to take out insurance covering liability for any damage.

[6] JV claims to have taken, on 2 March 2005, an effective assignment of the benefit of the deed. By letter of that date, the solicitors for Citimark advised the solicitors for Croakybill that Citimark had assigned the option to JV. With the letter they enclosed a copy of the deed of assignment of the option, and notification of JV's exercise of the option, together with the resultant contract and payment of the balance deposit. That purported exercise of option occurred on the last available day.

[7] The parties to the deed of 2 March 2005, providing for the assignment of the option, were Citimark and JV. Clause 2 of that deed provides:

> "2 Assignment
>
> 2.1 The Assignment Fee will be payable by the Assignee to the Assignor on the date of this Deed.
>
> 2.2 In consideration for the Assignment Fee, the Assignor assigns to the Assignee its right, title and interest in the Option, and any existing or future rights or claims the Assignor has under the Option against the Owner.
>
> 2.3 The Assignee agrees to take an assignment of the Option and covenants to comply with the terms of the Option.
>
> 2.4 The Assignee indemnifies the Assignor for any cost, loss or damage which the Assignor may suffer as a result of the Assignee failing to observe or perform any of the obligations of the Assignor under the Option or the Contract attached to the Option.
>
> 2.5 The Assignor agrees to give notice of the assignment of the Option to the Owner in the form of the notice attached and marked "A".
>
> 2.6 The Assignee and the Assignor will sign any other documents necessary to give effect to the terms and intent of this Deed."

[8] The issue committed to the primary Judge was whether that assignment complied with the mechanism for assignment set up by the deed dated 12 October 2004. The assignment may have bound Citimark and JV, but did it bind Croakybill? The primary Judge said no, because the requirements for an effectual assignment, as prescribed in cl 14 of the earlier deed, had not been satisfied.

[9] Clause 14 of the deed of 12 October 2004 is in these terms:

> "14 Assignment of Call Option
>
> 14.1 The benefit of this Deed may be assigned by the Grantee.
>
> 14.2 If this Deed is assigned the Grantee
>
> (a) will give notice in writing to the Owner;
>
> (b) will obtain a covenant from the assignee to be bound by this Deed; and
>
> (c) will remain liable to the Owner for due performance by the assignee of all obligations contained in this Deed and the Contract."

[10] His Honour characterized the assignment clause, comparably with an option clause, as what Diplock LJ called an "if" contract (*United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, 109); so that, for an assignment to be effective, there must have been strict compliance with the specified requirements. The Judge regarded the requirements set out in cl 14.2(a) and (b) as conditions precedent to an effective assignment. JV had contended they were conditions subsequent, but His Honour considered the absence of time limitations weighed substantially against that characterization. He read the opening words, "if this Deed is assigned...", as meaning: "If the grantee has agreed to assign the benefit of this option agreement…". He regarded the requirement for notice under cl 14.2(a) as a clear precondition for the effectiveness of an assignment, and then identified no reason to approach the requirement under (b) differently. The latter requirement was not in fact satisfied, simply because Croakybill was not party to the deed of 2 March 2005. JV challenges the correctness of His Honour's approach in each of those respects.

[11] I say at once it does seem plain that the parties intended the covenant under cl 14.2(b) be given in favour of Croakybill: see also cl 14.2(c). The contrary was not urged at the hearing of the appeal.

[12] The crux of the case is the interpretation of cl 14.2(b) of the deed of 12 October 2004. For an assignment to be effective and binding on Croakybill, must any instrument of assignment have been accompanied contemporaneously, by the notice to Croakybill under (a) and the covenant in Croakybill's favour under (b)? Alternatively, would it suffice for those matters to be accomplished forthwith upon the assignment, or within a reasonable time after the assignment?

[13] Mr McKenna SC, who appeared for the appellant JV, submitted that, naturally read, cl 14 did not establish any fetter on assignment, or prohibit assignment unless particular pre-requisites were met. He contrasted the language of cl 14 with that of other provisions in terms establishing conditions, eg cl 5.2.

[14] On the other hand, Mr Couper QC, for the respondent Croakybill, queried why the parties would have contemplated that an assignment of the benefit of the deed (cl 14.1) might occur at a time different from the assignee's assuming the burden of the deed (cl 14.2(b)).

[15] The primary Judge was influenced by his implicit view that these commercially contracting parties would not have contemplated an assignment which did not ensure the following: the assignee's assumption of a contractual obligation to Croakybill; Citimark's assumption of liability to Croakybill for the assignee's performance; and formal notification to Croakybill of the identity of the assignee, as the party assuming Citimark's obligations. He expressed a view that notice, in particular, was essential for the effectiveness of the assignment, and went on to treat the requirement under (b) similarly.

[16] The apparent purpose of the requirements under cl 14.2 is protection of the interests of Croakybill. If an assignment were to be accepted as complete prior to compliance with those requirements, Croakybill could be exposed to commercial risks. For example, Croakybill could be called upon to respond to a purported exercise of option by a party claiming to have taken an assignment, where Croakybill had received no notice from Citimark of that assignment. As to (b), Croakybill would be interested to ensure compliance with, for example, the grantee's obligations under cls 7 and 13. It would seem surprising were the parties to have contemplated anything other than a contemporaneous assignment of benefit and assumption of burden.

[17] Mr McKenna pointed out that an assignment of the debt may be valid in equity without notice having been given to the debtor (*Thomas v National Australia Bank Ltd* [2000] 2 Qd R 448, 455-6). There is also statutory provision regulating assignment: s 199 *Property Law Act* 1974 (Qld). But the present issue is not whether there has been an assignment binding in equity; and s 199 does not address the question which arises here. That is simply the proper construction of cl 14.2 – such as would be intended by commercially contracting parties knowing what they wanted to achieve, but not dependent on a working knowledge of common law/equity complications. As put in Meagher, Gummow and Lehane: "Equity Doctrines and Remedies", 4th ed, [6-465]:

> "… in principle it is possible by appropriate terms in an agreement to make a contractual right not assignable, or not assignable unless particular steps are taken (for example, the consent of the obligor is obtained), even though it would otherwise be assignable. The consequences depend on the language used."

See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 108.

[18] The modern authorities on the construction of commercial contracts suggest a court should not confine its consideration to the words used, but as appropriate extend the enquiry to include the purpose of the transaction, ensuring so far as possible that the construction adopted makes business sense. In *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 462, for example, the High Court said:

> "The construction … is to be determined by what a reasonable person in the position of [the appellant] would have understood them

> to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to [the parties], and the purpose and object of the transaction. In *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 350, Mason J set out with evident approval the statement by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, 995-996:
>
> > 'In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.'"

[19] In another recent case, *Sirius Insurance Co v FAI General Insurance Ltd* [2005] 1 All ER 191, 320 Lord Steyn in the House of Lords said this:

> "There has been a shift from literal methods of interpretation towards a more commercial approach. In *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed:
>
> > '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'
>
> In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352 at 372, [1997] AC 749 at 771, I explained the rationale of this approach as follows:
>
> > 'In determining the meaning of the language of a commercial contract … the law … generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'"

[20] These parties have expressly provided that written notice of assignment must be given to Croakybill. The purpose behind that requirement – protection of Croakybill – is obvious. That being so, one would ask why they would have contemplated that an assignment may be effected prior to the giving of the notice. Having reached that point, and acknowledging the similar motivation behind (b) – again, protection of Croakybill – there would seem no reasonable basis for treating the requirement under (b) any differently. As said by the primary Judge ([10]):

> "Why the requirement of paragraph (b) should be in a different category – a condition subsequent to be complied with within a reasonable time, as was argued for the plaintiff – is not at all clear. The better view, one appealing to common sense in my view, is that the latter requirements falls into the same category as the former."

[21] JV submitted that treating the requirements under cl 14.2(a) and (b) as conditions subsequent, or as obligations to be met concurrently with the assignment but not affecting its separate validity, would not leave Croakybill unprotected, because in the event Citimark failed to comply with them, having otherwise effected an assignment, Croakybill could terminate the deed of 12 October 2004. That would however leave Croakybill in a somewhat uncertain situation, especially because of the absence of time limitations in relation to (a) and (b), and a construction which, consistently with the language, would avoid that uncertainty, would be commercially preferable. On JV's approach, after an assignment as between grantee and assignee, but before compliance with cl 14.2(b), were the assignee to exercise the option, an issue could arise as to its validity: another uncertain possible consequence.

[22] Seeking to confront the obvious significance of the absence of time limitations in (a) and (b), JV engrafted a requirement that those matters be attended to "forthwith" or "within a reasonable time" of the purported assignment. That would itself inject a degree of uncertainty into the situation. And as pointed out for Croakybill, a reasonable time for compliance with (b) must have expired, by the latest, on the last date for exercise of the option by the grantee. JV had not satisfied (b) by that date, so that Croakybill could, and did, terminate the deed.

[23] Mr McKenna pointed to time stipulations elsewhere in the deed. On the other hand, the parties may have considered them unnecessary in cl 14, because of their intention (a) and (b) be accomplished prior to or concurrently with the actual assignment.

[24] I have said the crux of this case is the construction of cl 14.2. JV fundamentally challenged the Judge's reading of the opening words of that clause, and his not sufficiently acknowledging the prospective language of (a) and (b): "will give", "will obtain". I do not however consider that points in favour of JV's overall contention.

[25] Another way of reading cl 14 is that advanced by Mr Couper, and it is the construction I favour. Clause 14.1 ("The benefit of this Deed may be assigned by the Grantee"), he submitted, is speaking of assignment as between grantee (Citimark) and assignee (JV), and that is plainly correct. Similarly, the opening words of cl 14.2 ("If this Deed is assigned the Grantee …") are speaking of assignment as between those parties. But then the mandatory requirements, (a) and (b), obviously go to the effectiveness of the assignment as binding the owner (Croakybill). An overall context is the parties' presumed intent, commercially realistic, to ensure the assignment of the benefit and the assumption of the burden of the deed both be accomplished before Croakybill becomes bound to the assignment. That is, as I have said, the construction I favour. It involves no straining or re-construction of the language, and happens to lead to a commercially appealing result.

[26] JV challenged the Judge's characterization of the assignment clause as falling into the category of an "if" contract, and points out that examples of such contracts provided by Diplock LJ in *United Dominions* did not include an assignment. (I

doubt His Lordship intended to be exhaustive.) Counsel went on to submit that the Judge erred in assuming a consequent need for strict compliance with cl 14.2.

[27] It was not necessary for His Honour to characterize the covenant in any particular way. But I would in any case agree with the characterization he adopted. I do not think His Honour's characterization predisposed him – as was suggested – to adopt an unjustifiably narrow approach to cl 14.2: he comprehensively addressed, separately and with apparent care, the question of construction.

[28] The covenants contained in cl 14 do fall within the category described as follows by Diplock LJ in *United Dominions* (p 109):

> "Under contracts which are only unilateral – which I have elsewhere described as "if" contracts – one party, whom I will call "the promisor", undertakes to do or to refrain from doing something on his part if another party, "the promisee", does or refrains from doing something, but the promisee does not himself undertake to do or to refrain from doing that thing. The commonest contracts of this kind in English law are options for good consideration to buy or to sell or to grant or take a lease, competitions for prizes, and such contracts as that discussed in *Carlill v Carbolic Smoke Ball Co.* A unilateral contract does not give rise to any immediate obligation on the part of either party to do or to refrain from doing anything except possibly an obligation on the part of the promisor to refrain from putting it out of his power to perform his undertaking in the future. This apart, a unilateral contract may never give rise to any obligation on the part of the promisor; it will only do so on the occurrence of the event specified in the contract, viz, the doing (or refraining from doing) by the promisee of a particular thing. It never gives rise, however, to any obligation on the promisee to bring about the event by doing or refraining from doing that particular thing."

[29] Accordingly, in this case, if Citimark complied with cl 14.2 (though under no obligation to do so), then Croakybill would have been obliged to respect the assignment consequently effected. As said by Diplock LJ (p 109):

> "… the initial inquiry is whether the event, which under the unilateral contract gives rise to obligations on the part of the promisor, has occurred. To that inquiry the answer can only be a simple "Yes" or "No". The event must be identified by its description in the unilateral contract; but if what has occurred does not comply with that description, there is an end of the matter. It is not for the court to ascribe any different consequences to non-compliance with one part of the description of the event than to any other part if the parties by their contract have not done so."

It is, in short, simply a question of the construction of the deed, and resort to contractual theory is unnecessary.

[30] In my view, the appeal should fail. I would order that the appeal be dismissed, and that the appellant (JV) pay the respondent's (Croakybill's) costs, to be assessed.

[31] On 16 September 2005, Keane JA made an interlocutory order restraining Croakybill from contracting to sell the land pending the determination of the appeal. On my approach, no further order need now be made in respect of that order.

[32] **McPHERSON JA**: In 2004 Croakybill Limited was the registered owner of a large area of land at Rockhampton which it was developing as a residential subdivision. Citimark Properties Pty Ltd was interested in acquiring some 9.6 hectares forming part of that land.

[33] By a deed in the form of an indenture dated 12 October 2004, Croakybill granted to Citimark and "assigns" (cl 2.1) an option to purchase that property described as proposed Lot 501 as shown on the annexed plan of subdivision. In the deed, Croakybill is called the Owner and Citimark is called the Grantee. Clause 3.1 provided for payment of an option fee of $10,000.00, in consideration of which Croakybill as Owner offered in 3.2 to sell the land to Citimark as Grantee for the price of $1,800,000 and on the terms set out in what I will call the proforma contract in the schedule marked "A" to the option deed. That offer was by 3.2 to be irrevocable until the expiry date, which was the date 21 days after the Owner Croakybill gave notice to the Grantee Citimark that a separate title had issued for the property.

[34] A separate title for Lot 501 issued on 10 February 2005, which fixed the expiry date at 2 March 2005. On that day, Citimark and another company, which is now the plaintiff JV Property Syndicates Pty Ltd, executed a deed by which Citimark, as assignor, agreed to assign to JV as assignee the option granted by Croakybill to Citimark in the option deed of 12 October 2004. An assignment fee of $10,000.00 was payable and paid on 2 March 2005 by JV to Citimark, in consideration of which Citimark by cl 2.2 of the assignment deed assigned to JV its interest and rights against Croakybill under the option dated 12 October 2004. By 2.5, Citimark agreed to give Croakybill notice of assignment of the option.

[35] Again on the same day 2 March 2005, JV, described as the buyer, executed a written contract to buy Lot 501 from Croakybill as seller for the price of $1,800,000.00. This contract adopted, so far as relevant, the proforma contract scheduled to the option deed of 12 October 2004 but with the blank spaces, like the names of the buyer JV and its solicitors, filled in. On 2 March 2005, solicitors for JV wrote to Croakybill's solicitors a letter of that date, giving notice that Citimark had elected to assign the option to JV, and enclosing a copy of the deed dated 2 March 2005 assigning the option, together with two copies of the contract of that date signed by JV, and a cheque for the required deposit payment.

[36] Croakybill has refused to recognise as valid the assignment to JV of the option or the contract with JV said to have resulted from it. Its reason is that 14.2(b) of the option deed of 12 October required that, if that deed was assigned, the grantee Citimark would obtain a covenant from the assignee JV to be bound by the option deed. Some such covenant was enclosed with the letter of 2 March to Croakybill's solicitors, but, through a misreading of 14.2, the covenant was expressed to be from JV to Citimark instead of from JV to Croakybill. Croakybill took the view that the option had not been effectively exercised and refused to be bound by the ensuing contract of sale. JV as plaintiff started proceedings against Croakybill as defendant for specific performance of the contract damages for breach. The parties agreed to

submit to a judge of the Supreme Court the determination of a question of construction of 14.2 of the option deed. His Honour decided it in favour of Croakybill. Hence this appeal by JV.

[37] Clause 14 of the option deed between Croakybill as Owner and Citimark as Grantee is in the following terms:

> "14.1 The benefit of this Deed may be assigned by the Grantee.
>
> 14.2 If this Deed is assigned the Grantee
>
> (a) will give notice in writing to the Owner;
>
> (b) will obtain a covenant from the assignee to be bound by this Deed;
>
> (c) will remain liable to the Owner for due performance by the assignee of all obligations contained in this Deed and the Contract."

The Deed referred to is, of course, the option deed of 12 October 2004. In the context of what took place the reference to the contract in cl 14.2(c) is to the contract later entered into, as JV claims, on 2 March 2005 between it as assignee and Croakybill as the Owner; but, for reasons that will be explained, it is capable of referring to a contract for the purchase of the property by Citimark, which might have, but did not, eventuate.

[38] The learned judge held that compliance by Citimark with the provisions of para (b) of cl 14.2 of the option deed was a condition precedent to the assignment of the option granted by the deed and hence to its valid exercise by JV so as to bring the contract of sale with Croakybill into existence. His Honour reached this conclusion by relying in part upon remarks of the Court of Appeal in England in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, that the terms of an option must be strictly complied with before a contract results from exercise of the option, which is the acceptance of the irrevocable offer it constitutes. In doing so, his Honour treated the assignability and assignment of the option in the deed as an "if" contract; that is to say, as one resembling the contract in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, in which the act done by the offeree is both the simultaneous acceptance of the offer and the executed consideration for the offer that induced it: see *Australian Woollen Mills v Commonwealth* (1954) 92 CLR 424, 456.

[39] No one doubts that, to be effective, an acceptance must conform with the terms of the offer. Here, however, it is difficult to identify any analogy between assignment of the option under the deed and the offer or its acceptance in *Carlill v Carbolic Smoke Ball Co*. If anything, the appropriate comparison is between the option or irrevocable offer contained in option deed and the assignee JV's acceptance of it by completing and signing the contract of sale and communicating its acceptance to Croakybill on 2 March 2005. Croakybill's rejection of that acceptance is based on Citimark's failure to comply with the terms of cl 14.2 of the option deed, so preventing the effective assignment of the option by Citimark to JV. It amounts to an objection that JV was not a person authorised to accept the offer in the option deed. That is something different from the "unilateral" contract, which the *Smoke Ball* case is commonly regarded as exemplifying.

[40] Everyone agrees that the appeal turns on the interpretation of cl 14 of the option deed. It was the presence in cl 14.2 of the introductory word "if" in the expression "If this deed is assigned …" that led the judge to suppose that he was confronted with a *Smoke Ball* case and the application to it of what Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 928, described as a unilateral or "if" contract. But the mere presence of the word "if" does not attract that consequence. It does not follow from the use of it in cl 14.2 of the concluded contract constituted by the option deed between those two parties that everything that ensues is part of an offer to the grantee capable of acceptance only by strict compliance with its terms. The expression in cl 14.2 "if this Deed is assigned …" is, I am persuaded, intended to mean "In the event that this Deed is assigned …". As such, it creates no implication that what cl 14.2 requires to be done is a condition precedent to the effective assignment of the option deed or the benefit of the option it contains.

[41] If cl 14 had not been incorporated in the option deed, the benefit of the deed or the option to buy contained in it would nevertheless have been assignable either in equity or under the well-known provision in the Judicature Act, now transposed to s 199 of the *Property Law Act 1974*. There is nothing in cl 14 to displace the ordinary expectation that the option to buy is intended to be assignable by either means. No particular form is required for assignment in equity provided the meaning is clear: *William Brandt's & Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, 462. In particular, notice to the debtor or obligor is not a requisite of equitable assignment: *Thomas v National Australia Bank Limited* [2000] 2 Qd R 448. On the other hand, notice to the obligor is required to effect a statutory assignment under s 199 of the Act. Without it, an assignment under the Act does not take effect. There is some authority for the view that the notice required by the section must follow, or at least accompany and not precede, the assignment to which the section refers: see *New Zealand Factors Ltd v Farmers Trading Co Ltd* [1992] 3 NZLR 703, at 709. That accords with my impression of the language of the section, which speaks of express notice in writing which "has been given" of an absolute assignment. There is nothing in the section to suggest that the notice must or may be given in advance of the assignment itself. The express requirement in the option deed that notice be given to Croakybill that what was intended here was a statutory assignment under s 199 of the Act.

[42] An assignment under the statute operates, in the words of s 199(1), to "pass and transfer" from the date of the notice both: "(a) the legal right to such … thing in action", and "(b) all legal and other remedies for the same". The basic reason for requiring notice to be given is that, from the date of notice, the assignment under s 199(1)(c) transfers the power to give a good discharge for the chose in action assigned and does so without the concurrence of the assignor. Otherwise the obligor might pay or provide performance to the original contracting party or assignor instead of the assignee. In equity, where notice is not required to complete the assignee's title, these "priorities" as they may be called are regulated by the rule in *Dearle v Hall* (1828) 3 Russ 1, 23.

[43] On appeal, JV submitted there had been an equitable assignment of the option when Citimark and JV agreed on it, and a statutory assignment when notice was given on 2 March 2005, when the letter was delivered to Croakybill's solicitors on that date. Disregarding for the moment Croakybill's interpretation of cl 14.2 of the

option deed, that appears to be so. An irrevocable option to sell land confers an equitable interest in land: *London & S W Railway Co v Gomm* (1882) 20 Ch D 562, which is assignable by either method. That is so whether an option is regarded as an irrevocable offer or as a contract conditional on the exercise of the option: *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, 74-76.

[44] What matters here is the effect of the assignment on 2 March 2005 of the option to buy conferred by the option deed of 12 October 2004. It is clear, both under the statute and under the general law, that the benefit of the contract or other chose or thing in action is, when it is assigned, transferred from the assignor to the assignee. That follows from s 199(1)(a), which provides that the legal right to the debt or thing in action "is transferred" from one to the other. When the benefit of a contract is validly assigned, the assignor to that extent drops out of the transaction. I emphasise the point because Mr Couper QC for the respondent Croakybill said, in speaking of the option deed being assigned here, that cl 14.1 and 14.2 were to be read as if they were expressed to mean assigned "as between Grantee [Citimark] and Assignee" [JV]. According to ordinary rules of interpretation of deeds or contracts, there is no warrant for reading those words into the clause.

[45] It was not made completely clear what difference the addition of those words would make; but presumably what is meant is that the obligor Croakybill would not be bound or affected by the assignment until cl 14.2 was complied with. However, the ordinary meaning of "assigned" and "assignment" is shown in s 199(1), which is that the right to the thing in action is passed and transferred from the assignor to the assignee. It is not something that operates only between them; for it places the assignee in law in the legal position previously occupied by the assignor against the obligor. If it did not have this effect, it would be a mere agreement between them having no impact even in equity on the chose in action or the right to pursue remedies against the obligor. That is not what the statute provides in stating that the chose or thing in action, and the legal remedies for it, are passed are transferred. There is no reason to suppose that in speaking of the option or the deed being assigned, the parties to it meant it to have anything but its ordinary meaning or effect.

[46] Croakybill nevertheless insists that cl 14 and in particular cl 14.2 are to be interpreted as meaning that compliance with paras (a), (b) and (c) of cl 14.2 is a condition precedent to the efficacy of the assignment. It is difficult to see how that can be so in the case of cl 14.2(c), which provides that the Grantee Citimark "will remain liable to the Owner [Croakybill] for due performance … of all obligations contained in this Deed and the Contract". In this context "Contract" presumably means the contract that comes into existence in the form in the schedule when the option is exercised. It is true that Citimark itself has never entered into that contract to purchase the property; but, in addition to the option to buy conferred by cl 3.2 (where it is described as the Call Option), there is also a Put Option in cl 7 of the deed which Croakybill as Owner can require Citimark as Grantee to purchase the property for the price and on the terms set out in the proforma contract. That offer to buy, which is irrevocable, is to be open to acceptance by Croakybill until 7 days after the expiry date (which we now know was 2 March 2005). Its effect is to confer on Croakybill the power to compel Citimark to buy the property if its assignee did not do so, or if Citimark never assigned the benefit of the option.

[47] By its terms, the obligation contained in cl 14.2(c) was, so far as the Contract is concerned, incapable of being performed before the assignment, if any, by Citimark. The same is true of the further obligation in cl 14.2(c) that Citimark as Grantee was to remain liable for due performance by the assignee of all obligations contained in the option deed. That outcome is said in the cases to be the ordinary result of assigning a contract. The benefits but not the burdens pass to the assignee, so that the assignor remains liable to the obligor to perform his obligations under the contract: cf *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660, 668-669. In *Tito v Waddell (No 2)* [1977] Ch 106, 299-303, there are suggestions in the judgment of Sir Robert Megarry V-C of an emerging doctrine that both burden and benefit may pass by assignment, and it is possible that cl 14(1)(c) may have been inserted in order to displace any such result. It is, in any event, difficult to see how compliance with its provisions could operate as a condition precedent to assignment of the option to buy. Yet one would have thought that all or none of paras (a), (b) and (c) of cl 14.2 stated a condition precedent. Croakybill wisely, and perhaps conveniently, refrains from suggesting that it does.

[48] Instead, all the force of Croakybill's submissions is focussed on cl 14.2(b). Obtaining a covenant from the assignee "to be bound by this Deed" must be performed before, or at least contemporaneously with, the assignment contemplated in cl 14(2)(a). Otherwise, or so it is submitted, the assignment is ineffective. One may wonder, then, why cl 14 speaks of the "assignment", or the deed being "assigned" or of "the assignee", rather than of an intended or prospective assignment or assignee; but this is why Mr Couper advances the submission that "assignment" and its derivatives in cl 14 mean only an assignment "as between" the grantee Citimark and the assignee JV. I have already dealt with that attempted implication in the clause and there is no need to repeat it.

[49] Given that cl 14.1 is permissive ("the benefit of this deed may be assigned by the Grantor"), there is no reason to treat either cl 14(2)(a) or cl 14(2)(b) as stating more than contractual terms accompanying the right to assign. There is nothing at all in the clause itself to suggest that those terms must be fulfilled before the assignment can take effect, or even contemporaneously with it. I consider the comparison with a deposit payment relied on by Mr McKenna SC on behalf of JV to be an apt one. In *Millichamp v Jones* [1982] 1 WLR 1422, Warner J held a requirement in a contract of sale of land that a deposit be paid was not a condition precedent which, if not fulfilled, prevented the contract from coming into existence. It was, however, a fundamental term breach of which entitled the vendor to treat the contract as discharged or terminated. In reaching that conclusion his Lordship differed from a view adopted by Goulding J in an earlier decision in *Myton Ltd v Schwab–Morris* [1974] 1 WLR 331. See *Millichamp v Jones* [1982] 1 WLR 1422, at 1429-1430. Warner J might have been fortified to learn of the decision of the High Court of Australia in *Brien v Dwyer* (1978) 141 CLR 378, which of course was not cited to him. There the contract provided in cl 1 for payment of a deposit "upon" the signing of the agreement. The majority of the Court rejected a submission that the deposit need only be paid within a reasonable time of signing the contract; but their Honours also held that the effect of non-payment by the purchaser at the time of signing the contracts gave the vendor the right to terminate without further notice. Mr McKenna SC says the same applies here. Barwick CJ thought there was "much to be said" for the view that payment of the deposit was a condition precedent to the assumption by the vendor of the contractual obligation;

but his Honour said he had no need to decide the point (141 CLR 378, al 386). Gibbs J considered that there was nothing in cl 1 to suggest that payment of the deposit was a condition precedent to the coming into existence of the contract; but that it was a fundamental term failure to perform which entitled the vendor to renounce further performance (141 CLR 378, at 393). Stephen J (at 398) and Jacobs J (at 402) took a similar view of this question.

[50] The reason why their Honours considered that non-payment of the deposit justified immediate termination without prior notice from the vendor was because of the special character of a deposit payment (141 CLR 378, at 392, per Gibbs J; at 398 per Stephen J). It shows that the purchaser "means business", and is a security for due performance (141 CLR 378, al 406, per Aicken J). There is nothing in the process of assigning an option to purchase that has comparable significance, or that would require an assignment to depend on prior fulfilment of the provisions like cl 14.2(a) or 14.2(b). Indeed, as I have already said, it appears clear that, to comply with s 199 of the Act, written notice must follow and not precede the assignment. If the payment of a deposit is not regarded as a condition precedent to the contractual obligation to sell, there is much less reason for implying such a result in the case of cl 14.2(b) with respect to an assignment. Citimark having failed to provide the appropriate covenant from JV, Croakybill would or might be entitled to treat this breach of cl 14.2(b) as a renunciation of the option deed justifying its termination by Croakybill, as in *Brien v Dwyer* (1978) 141 CLR 378 for non-payment of the deposit in that instance.

[51] Whether Croakybill would be entitled to terminate the option deed for breach depends on its significance considered in the context of the contractual obligations as a whole, of Citimark's failure to perform the option deed by obtaining the covenant from JV to be bound by the deed. In practical terms, this comes down to a consideration of cl 5 and cl 13. By cl 5.4, Croakybill agreed to allow Citimark access to the property for the purpose of conducting inspections, surveys and investigations during a two-month "due diligence period". Such access was to be arranged by prior appointment with Croakybill: cl 5.4(d). In exercising its rights under cl 5.4, Citimark was to cause the least possible disturbance to the property: cl 5.5(a) and to comply with the obligations imposed by cl 13.2: see cl 5.5(b).

[52] Clause 13.2 provides that, in conducting inspections and carrying out inspections and engineering, building and geotechnical investigations, the grantee Citimark will: (a) notify the owner Croakybill, and (b) take out and maintain an insurance policy for not less than $10 million for loss or damage arising during the exercise of this right of entry by the grantee, its servants, agents and consultants. After exercising its rights to enter, the grantee is to restore the property as nearly as possible to its former condition. On the grantee failing to do so, Croakybill may recover the cost of doing so from the grantee: see cl 13.3 and cl 13.5. It can only be to these obligations that cl 14.2(b) is directed in requiring Citimark to obtain a covenant from the assignee to be bound by the deed.

[53] Because the land in question is vacant land intended for subdivision and residential use, it is not altogether easy to see why Croakybill should have been so concerned to cover itself in this extensive fashion against the possibility of Citimark, by its engineers and others, causing the comparatively slight damage that might have been expected to result from their entry and investigations on the

property. Croakybill was, however, entitled to insist as it did on the inclusion of these provisions in the option deed. What is said, however, is that unless cl 14.2 is viewed as a condition precedent to the assignment contemplated in cl 14, the possibility exists that JV as assignee might enter on the land without giving the notice required by cl 14.2 and cause the damage apprehended in cl 13.2; and do so without taking out and maintaining the insurance policy in the name of Citimark that is envisaged in that clause. That this may occur is said to produce a fatal gap in time, during which Croakybill will be at risk, between assignment of the option and the provision of the covenant in terms of 14.2(b). It is this possibility that is said to compel the conclusion that compliance with cl 14.2(b) was intended to be a condition precedent to the assignment authorised in cl 14 of the option deed.

[54] I do not, however, consider that this conclusion follows. If the option deed is assigned under cl 14.2, and whether the covenant required by cl 14.2(b) is obtained contemporaneously or later from the assignee, the grantee Citimark remains liable under cl 14.2(c) to the grantor Croakybill "for due performance … of all obligations contained in" the option deed. They include the obligation in cl 13.2 to notify Croakybill of its entry on the land and to take out and maintain the required insurance policy. The assignment transfers the benefit but not the burden of the option deed from Citimark to JV. The assumption being made by Croakybill seems to be that, in the event of an assignment, the assignee acquires a right to enter on the land to conduct investigations on it that may cause damage requiring restoration. I will for the moment assume this to be so, although I am by no means satisfied that it is the result of an assignment. It may be that only Citimark had that right.

[55] If entry and damage were to take place in this way, Citimark would be liable to for it. As it happens, however, no such entry or damage has occurred; or, if it has, JV could not and cannot be legally responsible for it. That is because Croakybill's agreement to allow access to the property by Citimark for the purpose of inspections or investigations is limited by cl 5.4 to the "due diligence period", an expression which is defined in cl 5.1 to mean "the period from the option date to the date 2 months after the option date". The "option date" is not itself defined, but its natural meaning is the date of the option deed, which was 12 October 2004. Two months after that date was 12 December 2004, by which date there had been no assignment of the option, which did not take place until 2 March 2005. The right, if any, of JV to enter the land and cause investigations to be made on it, therefore expired well before the assignment occurred. In the events that have happened, there could never have been any question of a covenant being provided by or obtained from JV to cover damage caused by it to the property during the due diligence period ending two months after the date of the option. That is so even if "the benefit of this deed" assignable under cl 14.1 included the benefit of cll 5.4 and 13.1 governing entry and investigations on the property. The short duration of the "due diligence period" tends to suggest it was a benefit exercisable only by Citimark.

[56] I recognise that it does not necessarily follow that performance cl 14.2(c) is not a condition precedent to the assignment authorised by cl 14; but it disposes of Croakybill's argument that the critical reason for that interpretation of cl 14.2(b) is that it leaves a gap in time between the assignment and the provision of the covenant during which Croakybill remains at risk of damage with no covenant from the assignee. In my view, there is nothing in the language of cl 14 or the terms of the option deed to make compliance with cl 14.2(b) a condition precedent to

effective assignment of the deed of 12 October 2004 or of the exercise by the plaintiff of the option it conferred. The terms of cl 14.2(b) simply state an accompanying contractual obligation to be performed like any other, and having the same consequences if breached as any other such obligation. The purchaser of the land is now the plaintiff JV, which exercised the option on 2 March 2005.

[57] It follows in my opinion that:

1. The appeal should be allowed with costs here and in the court below including the costs of and incidental to this proceeding.
2. The order dismissing the action should be set aside. Instead, it should be determined and declared that the deed dated 12 October 2004 executed by the defendant and Citimark Properties Pty Ltd, or the benefit of the option to purchase contained in it, was effectively assigned to and exercised by the plaintiff on 2 March 2005.
3. On the usual undertaking as to damages, the injunction granted on 16 September 2005, should be continued until the determination of this action or until earlier order.

[58] **MACKENZIE J:** This is an appeal against the dismissal of an action for specific performance and other relief arising from a transaction in which a put and call option agreement was entered into by the respondent Croakybill Limited ("Croakybill") as owner and Citimark Properties Pty Ltd ("Citimark") as grantee. The deed was made on 12 October 2004. The appellant plaintiff J V Property Syndicates Pty Ltd ("JV") claims under a deed made on 2 March 2005 between Citimark as assignor and the appellant as assignee.

[59] The necessary background facts are that the respondent was registered proprietor of land in Rockhampton. The deed executed by the respondent and Citimark involved an option to purchase part of the land, proposed Lot 501. The respondent had applied for development approval and reconfiguration of the proposed Lot 501. On 8 February 2005 the plan of subdivision was approved by the Council and on 21 February 2005 approval for reconfiguration of Lot 501 was given. The date upon which the notice was given to the grantee that a separate title had issued for the property was significant because it triggered a 21 day period within which the grantee could exercise the call option. If it did not do so, the respondent could exercise the put option within a further period. It is common ground that the expiry date for exercising the call option was 2 March 2005. The appellant purported to exercise it, on 2 March 2005, as assignee.

[60] It is admitted on the pleadings that, by letter dated 2 March 2005, notice was given to the solicitors for the respondent that Citimark had assigned the benefit of the option agreement to the appellant. At the same time, a copy of the deed of assignment of option "confirming the assignee's covenant to be bound by the option in accordance with clause 14.2(b)", copies of the contract executed by the appellant, and $65,000, being the balance of the deposit, were also delivered to the respondent's solicitors.

[61] However, it was denied by the respondent that the notice of assignment and the deed of assignment were effective to assign the benefit of the option agreement because, it was said, the deed of assignment did not contain a deed of covenant in favour of the respondent from the appellant in accordance with clause 14.2(b). Nor

had Citimark otherwise obtained it. In its reply, the appellant pleaded, inter alia, that compliance with clause 14.2(b) was not a condition precedent to the effective assignment of the benefit of the agreement between Citimark and the appellant.

[62] The judgment appealed from was given in consequence of a separate determination, pursuant to r UCPR 483, of an application by the respondent concerning the following issues:

(a) Whether the benefit of the deed executed by the respondent and Citimark dated 12 October 2004 was effectively assigned by Citimark to the appellant; and

(b) Whether the appellant was entitled to exercise the option contained in that deed.

[63] The respondent sought declarations:

(a) That the benefit of the deed made on 12 October 2004 was not effectively assigned by Citimark to the appellant; and

(b) That the appellant was not entitled to exercise the option contained in that deed.

[64] These declarations were granted and the action was dismissed with costs. The operation of the orders, including one for removal of a caveat, was stayed by the learned trial Judge until 11 August 2005. On 10 August 2005 the President gave directions in the form of a timetable for steps to facilitate the hearing of the appeal and, on the respondent's undertaking not to enter into a contract to sell the land or otherwise deal with it without 14 days notice to the appellant, dismissed the appellant's application for a stay. On 16 September 2005 Keane JA granted an injunction in similar terms, operative until determination of the appeal.

[65] The deed between Citimark and the respondent made the following provisions for assignment of the call option:

"14.1 The benefit of this Deed may be assigned by the Grantee.

14.2 If this Deed is assigned the Grantee

(a) will give notice in writing to the Owner;

(b) will obtain a covenant from the assignee to be bound by this Deed; and

(c) will remain liable to the Owner for due performance by the assignee of all obligations contained in this Deed and the Contract."

The essential issue before the learned trial Judge was whether the purported assignment from Citimark to the appellant was effective.

[66] The learned trial Judge characterised the assignment clause as an "if contract". He held that its terms were required to be strictly complied with. The principle upon which he acted was set out in a passage from the judgment of Williams JA in *Rushton (SA) Pty Ltd & Ors v Holzberger & Ors* [2003] QCA 106 where authority for the proposition, including *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, was referred to. That principle, it was noted by the respondent before us, was concerned with the exercise of options.

[67] The critical passage of the learned trial Judge's reasons is the following:

> "It cannot be doubted that notice in writing to the defendant of an assignment required by paragraph (a) is necessary for the effectiveness of the assignment and so may properly be regarded as a condition precedent to effectiveness. Why the requirement of paragraph (b) should be in a different category – a condition subsequent to be complied with within a reasonable time, as was argued for the plaintiff – is not at all clear. The better view, one appealing to common sense in my view, is that the latter requirement falls into the same category as the former. But just as the position of paragraph (b) after paragraph (a) assists in its construction, so does its position before paragraph (c). Paragraphs (b) and (c) of clause 14.2 contain provisions the object of which is clearly enough to provide protection to the defendant, and would have been understood by a reasonable person in the position of Citimark as such: first, by ensuring that the assignee is bound by the obligations in the deed, prominent among which are the obligations in clause 7 and clause 13; and secondly, by providing that Citimark remains liable to perform all its obligations provided for in the deed and contract. The absence of provision in the deed as to the time within which the covenant was to be obtained from the assignee and the consequences of failure to do so supports the argument that that requirement is a condition precedent and not a condition subsequent."

[68] The appellant submitted that the learned trial Judge's approach was erroneous in principle in several respects. The first was that his characterisation of the contract as an "if contract" was erroneous. The second was that it was erroneous to conclude that the terms of the contract must be strictly complied with, because clause 14.2 merely provided for certain contractual obligations to arise in the event that an assignment occurred. They were not expressed to be conditions of the validity of the assignment. The third was that it was erroneous to conclude that notice in writing was necessary for effectiveness of the assignment. Fourthly, it was erroneous to conclude that the only purpose of clause 14.2 was to provide protection for the owner. It was submitted that that purpose was adequately served by the right of the respondent to terminate the option agreement for repudiation or breach, in the event that the obligations in clause 14.2 were not satisfied.

[69] Important provisions in the deed of assignment are to be found in clause 2.5 and clause 2.6. They are as follows:

> "2.5 The Assignor agrees to give notice of the assignment of the Option to the Owner in the form of the notice attached and marked "A".
>
> 2.6 The Assignee and the Assignor will sign any other documents necessary to give effect to the terms and intent of this Deed."

[70] It may be that clause 2.6 is a general clause to ensure that anything that had not been contemplated in the deed but was necessary to give effect to its terms and intent could be dealt with later. The inclusion of a covenant referred to in clause 2.3 in a form which operates only between the appellant and the assignee may suggest that the person who drafted the document believed the issue of obtaining a covenant of

the kind referred to in clause 14.2(b) had been addressed. Unfortunately, that is incorrect. Clause 2.3 is as follows:

> "2.3 The Assignee agrees to take an assignment of the Option and covenants to comply with the terms of the Option."

[71] The effect of clauses 2.3 and 2.4 is that the burden of the option agreement, as between the assignor and the assignee, is assumed by the assignee. The assignor achieves protection against costs, loss or damage which it may suffer as a result of the assignee failing to observe or perform any of the obligations of the assignor under the option agreement. Clause 2.3 is not concerned with the relationship between the owner and the assignee.

[72] It may also be noted that in a letter written as part of the correspondence following the commencement of the dispute, it is not entirely clear that clause 2.3 proceeded from some kind of misunderstanding about what was necessary by way of a covenant. A letter from the appellant's solicitors dated 30 March 2005 states:

> "Our client does not agree with the content of your letter. In particular, our client does not agree that the option has not been properly assigned or that the option has not been properly exercised.
>
> Our view is that upon exercise of the call option, there was no utility in securing a covenant in favour of the vendor. However, and without any admission that your allegation is correct, if your client requires a covenant signed by the assignee directly in favour of the owner, our client is happy to provide one."

It tends to suggest that the view acted upon was that, in the circumstances, a covenant was not necessary. It is not necessary to pursue further whether that was an *ex post facto* rationalisation or a belief held at the time of executing the deed of assignment.

[73] The understanding of one party of the necessary process for creating a valid assignment is in any event not decisive. The meaning and the effect of the words used in the context of the document are the primary concern.

[74] It may also be accepted that, as the respondent submits, in principle, a contractual right may, by use of an appropriately drafted provision, be made non-assignable at all, or assignable only if particular steps are taken. (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1984] 1 AC 85, 102 et seq). Clause 14.2 is not expressed as a prohibition on assignment. Indeed, it follows an express provision in clause 14.1 which states that the benefit of the deed may be assigned by the grantee. One of the questions clause 14.2 raises is what is meant by its commencing words "If this deed is assigned". The learned trial Judge accepted that it was equivalent to "If the grantee has agreed to assign the benefit" of it. The appellant submits that this is not a natural reading of the clause, especially when it immediately follows clause 14.1. That, in my view, is not decisive because it does not shed light on the essential question of the timing of the requirements imposed by clause 14.2(a) and (b).

[75] Paragraphs (a) and (b) of clause 14 relate to obligations cast on the grantee of the option. On the other hand, clause 14.2(c) is concerned with confirmation of

protection to the owner. In addition to Citimark itself remaining liable to the respondent, the liability extends to it in the event that the assignee fails to duly perform the obligations in the deed and the contract. The purpose of the covenant in clause 14.2(b) is to create an alternate means of recourse in the event of failure by the assignee to perform the obligations, which may in certain circumstances have advantages for the owner. Citimark's failure to obtain a covenant in the owner's favour diminishes the extent of the owner's remedies, at least until the option is validly exercised.

[76] The area of dispute refined in submissions before us into two competing propositions. The first was whether clause 14.2(b) was a condition precedent to the effectiveness of the assignment against the grantor. The second was whether provision of the covenant was simply something that could be attended to when the assignment was being effected or subsequently. Mr McKenna stated five general principles as the framework of the argument on the appellant's behalf. The first was that contractual rights are assignable. Freedom of assignment may be fettered expressly or impliedly by the terms of the contract. An issue in individual cases may be whether there is a condition precedent to exercising the right or whether the requirements are merely accompanying obligations.

[77] The second was that assignment vests the benefit of a contract. The obligations remain those of the assignor. The third was that there was a distinction between an agreement to assign and an assignment. An agreement to assign is a contractual arrangement. An assignment can be completed by sufficient evidence of compliance with the necessary formalities of assignment. The fourth was that contractual rights may be validly assigned in equity upon a sufficient manifestation of an intent. Notification to the other contracting party of the assignment is not a pre-condition of a valid assignment in equity. Questions of construction may arise as to the value of an equitable assignment if, as a matter of construction, questions were to arise, for example, as to whether only the original party to contract could exercise it. The fifth point was that contractual rights could be assigned pursuant to statute by satisfying the requirements of section 199 of the *Property Law Act 1974*, which provides for giving notice to the other party.

[78] Mr McKenna submitted that it was apparent from the terms of the contract elsewhere, (clauses 5.2, 5.4, 5.5), that the parties were aware of the difference between imposing conditions on the exercise of a right and accompanying obligations. He pointed out that clause 14.2(a) and (b) used the future tense. It was submitted that that was consistent with the events referred to occurring after the actual assignment had occurred.

[79] In anticipation of Mr Couper's submissions, Mr McKenna submitted that issues concerning the exercise of a put option under the agreement were irrelevant having regard to the way in which this case developed. He submitted that upon the exercise of the put option, a new contract came into existence between the assignee and owner. He submitted that if the call option had not been exercised, the owner had the right to put the property to the grantee. The concern expressed over the absence of a covenant by the assignee to be bound by the deed, was that the property could only be put to the grantee, not the assignee, because the assignee had not accepted the burden of the contract. It was submitted that the practical consequence of the

exercise of the call option was that, as this case turned out, the covenant became a dead letter.

[80] Also in anticipation of Mr Couper's submissions, the issue of the right of the grantee to enter the property pursuant to clause 13 of the option agreement to conduct tests and inspections, with consequent loss or damage occurring, was addressed. Since the clause related to the grantee assuming responsibility for such loss and damage, the respondent's submission was perceived to be that the assignee could not be pursued if it had entered and done the damage. It was submitted that if there was such a gap in protection for the owner, it should not be a significant reason for construing the condition in clause 14.2(b) as a condition precedent. It was submitted that it would be a sufficient ground for the owner to terminate the contract for repudiation if the assignee did not give the covenant. If the covenant was not tendered within a reasonable time, it was potentially repudiatory conduct. The option deed could be terminated.

[81] Mr McKenna also submitted that vagueness arising from economy of words as to what kind of covenant had to be obtained pursuant to the obligation in clause 14.2 counted against it being a condition precedent. He accepted that it had been found by the learned trial Judge that it referred to a covenant in favour of the owner. However, Mr McKenna pointed to the events in this case, including willingness of the assignee who had, on the last day, purported to exercise the option without having given the covenant, but was prepared to give it subsequently once the problem was pointed out, as support for the proposition that the nature of the covenant to be obtained was ambiguous.

[82] With regard to the learned trial Judge's reasons, he submitted that the way the learned trial Judge had approached the matter created a predisposition to the answer finally given. He submitted that it was wrong in principle to treat assignment clauses and the exercise of options as being subject to the same principles. He also made submissions about the focus on agreements to assign in the reasons. This will be returned to later.

[83] He submitted the key to the proper answer to the question of interpretation of clause 14.2 was that if assignment was regarded as something that could only occur with notice, and if the opening words of the clause suggested a time sequence, it would be problematical to find that notice of the assignment had to be given as a condition precedent. He submitted that if it was accepted that an assignment could be effected without giving notice, the problems about the clause disappeared because, in effect, it meant that if the benefit was assigned in any legally effective way, including in equity, then the obligation to give notice then arose. Any remaining problems were related to the question of who might exercise the option, even though there was a valid assignment.

[84] It was accepted by Mr McKenna that the alternative possibility was that the intention was that notice was necessary to effect the assignment. The learned trial Judge had said, that, in effect, the absence of a time limit for doing so put the owner in the situation that he did not know the identity of the party who might be entitled to exercise the option. He may not know that there had been a valid assignment unless notice was given before the option was exercised.

[85] Mr Couper submitted that the purpose of the provisions in clause 14 was to ensure that the burden and the benefit passed to the assignee at the same time.

[86] He submitted that it was incorrect to say that the learned trial Judge had a pre-disposition to construe the clause strictly. All he did was discuss a basis for dealing with the submission that the covenant given to the grantee by the assignee in clause 2.3 of the deed of assignment was compliant with the obligation in clause 14.2.

[87] With regard to the question of whether the matters in clause 14.2(a) and (b) were intended to be done before the assignment became effective, Mr Couper accepted that there could be an assignment between grantee and assignee creating rights as between them without notice to the owner. He submitted that clause 14.2 was designed to establish conditions precedent to the effectiveness of the assignment as between the assignee and the owner.

[88] With regard to the reference to agreements to assign, Mr Couper, who had appeared below, suggested that if there had been a loose use of the term in consequence of the submissions made below, the distinction intended to be drawn was between an assignment as between grantee and assignee and an assignment effective against the owner. It was submitted that, in that context, the reasoning of the learned trial Judge was sound. If it was looked at from the point of view of the existence of an assignment only between grantee and assignee, a necessary step to bind the owner as grantee of the option, was, firstly, notice in writing to it.

[89] With regard to the question of implying, into a provision that did not expressly refer to time, the kind of interpretation relied on on behalf of the respondent, Mr Couper advanced the notion that the question was at what point the assignment became effective against the owner. Where there was a provision that allowed an assignee to immediately exercise an option, it was unsustainable to maintain that it could be exercised without notice under clause 14.2(a) and without complying with clause 14.2(b).

[90] With regard to Mr McKenna's argument concerning the possibility that attempting to exercise rights under the assignment without complying with clause 14.2(b) may amount to repudiation, it was submitted by Mr Couper that the proper interpretation was that there was no right to exercise the option; the owner should not be left only with a possible remedy that depended on whether there had been repudiation. The intent of clause 2.3 was that there was to be an obligation in the form of the grantee obtaining a covenant from the assignee to be bound by the option deed. Since there was no direct express obligation on the assignee to give such a covenant, it would be necessary for the owner to be able to identify a contractual relationship that could be repudiated, and attribute acts of the assignee to the grantee. In effect, the owner could be left with a more uncertain remedy.

[91] With regard to the construction of clause 14.2, Mr Couper submitted that clause 14.2(a) was a precondition to effective assignment of the right to the assignee. Clause 14.2(b), stripped of any preconception that the opening words of clause 14.2 mean that there has been an effective assignment for all purposes, raised the issue of what was the commercially sensible construction. Because the clause contemplated a passing of the burden, the proper view was that the covenant had to be given before the assignment was effective against the owner. It was submitted that, also,

clause 14.2(c) supported that construction because it contemplated that upon assignment, liability was accepted by the assignee and the grantee remained liable for due performance by the assignee of its obligations contained in the deed and the contract. Clause 14.2(b) was designed to protect the owner. It was irrelevant to look only at the circumstances of the case and say that as matters had turned out, the owner could not be adversely affected by the absence of the covenant.

[92] It was submitted that the straight-forward construction was that the intention of the owner and the grantee was that as between owner and assignee, the acceptance of the burden by means of a covenant to be obtained by the grantee and the taking of the benefit were to coincide. There was to be no gap between the passing of the benefit and the assumption of the burden. For that reason, the covenant must be given before the assignment would become effective against the owner. Until the grantee, upon whom the obligation under clause 14.2(b) fell, obtained the covenant from the assignee and provided it to the owner, there was no effective assignment.

[93] Where a question of construction of provisions of this kind has to be resolved, it is, in my view, irrelevant to focus on only what happened, as a matter of fact, in the evolution of events. The intention of the parties must be ascertained from the words used by them, aided, if necessary, in this kind of case, by the facts that the parties were all commercial organisations who presumably had commercial considerations in mind and who had the assistance of solicitors to achieve those objectives. Of course, it is also important not to allow commercial considerations override the plain meaning of the words used, but if there are ambiguities, commercial considerations may assist in resolving them.

[94] With the commercial purpose identified above in mind, there is in my view no reason to disagree with the construction placed on clause 14.2 by the learned trial Judge. There is less commercial sense in a construction that has the consequence that there will be some period, depending on how long the grantee takes to obtain the covenant from the assignee, when the only means of recourse in the event of non-performance of the obligations under the deed of 12 October 2004 will be against the grantee. There is nothing commercially incongruous in making provision for assumption of liability for the burden of the contract by the assignee as well as confirming liability of the grantee, to arise no later than the time when the assignee purports to exercise the benefit under the deed.

[95] For the reasons given, the appeal should be dismissed with costs. In the result, the injunction referred to in [64] above lapses without further order.