SUPREME COURT OF QUEENSLAND

CITATION:	*Pilot Farm Holdings Pty Ltd v Inbiz Investments Pty Ltd as Trustee for the Pilot Farm Unit Trust* [2011] QSC 99
PARTIES:	**PILOT FARM HOLDINGS PTY LTD** (applicant) **v** **INBIZ INVESTMENTS PTY LTD AS TRUSTEE FOR THE PILOT FARM UNIT TRUST** (respondent)
FILE NO/S:	2183 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED EX TEMPORE ON:	11 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2011
JUDGE:	Daubney J
ORDER:	**1. The application is dismissed** **2. The applicant pay the respondent's standard costs of the application.** **3. The applicant refund the $200,000 paid by way of deposit under the December deed.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – whether a particular clause could be severed from the void agreement and compel the respondent to enter into a new or fresh put and call agreement – whether the particular clause could still operate notwithstanding s 19 of the *Land Sales Act* 1948 (Qld) rendering the contract void *Land Sales Act* 1948 (Qld), ss 8, 9, 19 *Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209, cited
COUNSEL:	S J Given for the applicant P D Tucker for the respondent
SOLICITORS:	Hallett Legal for the applicant Nicholsons Solicitors for the respondent

HIS HONOUR: Central to this application by the applicant for, amongst other things, a declaration about the proper construction of a particular clause of the contract, and specific performance of that contract, is consideration of both the terms of the contract itself and the current status of that contract as a matter of law.

It is sufficient for present purposes to note that the relevant contract in question between the parties is a deed dated 22 December 2010 which provided for put and call options in respect of certain property which was proposed to be subdivided and contained on a plan of proposed subdivision. The applicant is the putative developer of the industrial estate within which the land is contained. The material discloses a history of dealings between the parties over the last few years including a number of deeds entered into in 2007 and 2008 providing, in effect, for a put and call option in respect of the proposed lot. As I have said, however, the relevant contractual document is the deed that was entered into in December 2010.

It is not in issue between the parties that the Land Sales Act 1994 applies to this deed and indeed, the 2010 deed expressly provided that it was subject to and conditional upon the respondent, "obtaining an exemption, pursuant to the provisions of section 19 of the Land Sales Act 1948 (the Act) from the provisions of sections 8 and 9 of that Act."

The terms of clause 16.1 then imposed on the respondent an obligation to apply to the Registrar of Titles for that exemption within the period prescribed in section 19(7) of the Act. The applicant as vendor consented to the respondent making that application.

As events transpired, however, the respondent did not make the necessary application for exemption and accordingly no such exemption was obtained. Amongst other things the fact that no such exemption was obtained had the effect of bringing the terms of the Land Sales Act into operation. In particular section 19(8) of the Act provides, "Where application for exemption for the purposes of subsection (6) is not received by the registrar within the time prescribed by subsection (7) the instrument in question referred to in subsection (6) is void and any person who has paid money thereunder shall be entitled to recover the amount thereof, together with the amount of interest (if any) that has accrued in respect of the money since it was so paid, by action as for a debt due and owing to the person by the person to whom the money was paid."

There is no issue before me that this section had effect in the present case to render the 2010 deed void. The applicant's case, however, turned on the terms of clause 16.3 of the deed which provided: "In the event that the Exemption is not obtained within sixty (60) days of the date of this Deed, the parties will use their best endeavours to make such other arrangements to ensure their intentions as expressed in

this deed will remain binding, valid and enforceable as

between themselves at all relevant times."

It was submitted for the applicant that, notwithstanding the operation of the Land Sales Act to render this deed void, clause 16.3 would and could properly be severed from the void agreement and then find operation in such a way as to effectively compel the respondent to enter into a new or fresh put and call agreement essentially on the same terms as that which was rendered void as a consequence of the fact that the necessary exemption was not obtained. It seems to me, however, that the argument advanced by the applicant fails in limine. The operation of the statute in my view is clear - it is, in the circumstances of this case, to render the December 2010 deed void. This is not a case such as was referred to in the authorities relied on by the applicant of severing a clause in circumstances of illegality attaching to the formation or performance of a contract, rather this is a case of a contract which was perfectly legal in formation and performance which was, as a consequence of statutory prescription, rendered void.

As was pointed out by Macrossan CJ in Day Ford Pty Ltd v Sciacca [1990] 2 Queensland Reports 209 at 215, the effect of the statutory avoidance is to render the contract "avoided in its entirety". That means that clause 16.3 of the 2010 deed falls away and is not available now to be relied on by the applicant.

Even if I am wrong about that, and clause 16.3 still has life as a severed clause, it seems to me that the effect of clause

16.3 is either or both uncertain or susceptible to leading to avoidance of the statutory intent contained in the Land Sales Act. The terms of clause 16.3, albeit couched as a "best endeavours" clause, link the obligation on the parties to use best endeavours to make unidentified "other arrangements" which it is said will ensure their intentions as expressed in the deed will remain binding.

That clearly smacks of an agreement to agree and as such would be difficult to maintain. But, in any event, it seems to me, as was discussed in the course of argument, that the difficulty with clause 16.3 is that giving effect to it in the way now sought by the applicant would lead to the inelegant outcome of a subversion of the statutory intent provided for in, amongst other things, section 19 of the Land Sales Act.

In all the circumstances therefore it is appropriate for the application to be dismissed.

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HIS HONOUR: Despite Mr Given's urgings I propose ordering the applicant to pay the respondent's costs. Apart from the fact that that is the usual order for an unsuccessful litigant to pay the successful litigant's costs, the application, for the reasons I mentioned before, was in my respectful view doomed to failure. Another outcome short of litigation might simply have been to walk away from the void contract and refund the monies that had been paid under the contract.

There will be an order that the applicant pay the respondent's standard costs of the application and there will be an order as requested by counsel for the respondent and not opposed by counsel for the applicant, that the applicant refund the $200,000 paid by way of deposit under the December deed.
