SUPREME COURT OF QUEENSLAND

CITATION:	*Street & Anor v Ladini* [2012] QSC 9
PARTIES:	**TERENCE GEORGE STREET** **(first applicant)** **BEVERLEY MAY STREET** **(second applicant)** **v** **GIANNI LADINI** **(respondent)**
FILE NO:	BS7547 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	6 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2011
JUDGE:	Mullins J
ORDER:	**Application dismissed**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – ACCEPTANCE – where the applicants granted the respondent an option to purchase their real property – where option fee was $100,000 – whether prior to entering the agreement the respondent agreed to an additional oral term that the respondent would pay $5,000 per month to the applicants during the option period EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – KNOWLEDGE – where the applicants granted the respondent an option to purchase their real property – where the respondent's solicitor prepared the agreement – where the respondent's solicitor advised the applicants that he could not act for them in the transaction – where the applicants claim to be at a special disadvantage due to their age and/or infirmity or a lack of assistance or explanation about the transaction – where the respondent had knowledge of the applicant's circumstances – whether the applicants could show that the transaction was grossly improvident *Blomley v Ryan* (1956) 99 CLR 362, followed *Bridgewater v Leahy* (1998) 194 CLR 457, considered *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, considered

COUNSEL: JM Horton for the applicants
CA Wilkins for the respondent

SOLICITORS: Adamson Bernays Kyle & Jones Lawyers for the applicants
HopgoodGanim Lawyers for the respondent

[1] The applicants are the vendors and the respondent is the purchaser under a put and call option agreement (the agreement) made on 18 June 2009 in respect of the applicants' residential property situated at Hope Island (the property). The applicants seek a declaration that they have validly terminated the agreement by notice given on 5 July 2011 for breach of an additional oral term that the respondent would pay the applicants $5,000 per month. In the alternative, the applicants seek either an order that the respondent is estopped from exercising rights under the agreement or an order setting aside the agreement on the ground it was procured by the respondent's unconscionable conduct.

[2] The evidence-in-chief of the parties and other witnesses was by affidavit. There was cross-examination of the applicants, their daughter Ms Nicole Street, the respondent, and the respondent's solicitor Mr Morwood. There are factual disputes that require resolution, before the parties' legal rights can be determined.

Background

[3] The applicants and the respondent were neighbouring owners of land at Hope Island for over 19 years. They became friends. The respondent operates a restaurant at which the applicants dined on a weekly basis free of charge.

[4] When they entered into the agreement, Mr Street was 68 years old and Mrs Street was 67 years old. At the time of the relevant events the applicants were in receipt of the aged pension that was close to the full pension of about $1,000 per fortnight which was their only source of income. They had previously resided on the Mornington Peninsula. Their two daughters continued to reside there and they visited them for lengthy periods each year.

[5] Prior to the agreement, there was at least one occasion on which the respondent had lent the applicants $17,000 when they needed funds and the sum was repaid without interest by the applicants.

[6] Over the years developers had shown interest in the applicants' property and the respondent's property. In the course of his evidence Mr Street referred to possible prices for the property for sale to developers, both before and after the agreement, which incorporated a premium for the development potential of the property. Mr Street certainly had his own view about what the property was worth at the time the applicants entered into the agreement, although he acknowledged the impact of the global financial crisis on the saleability of the property. He would still sell the property for $2.5m, even though he believed it was worth more, because "nothing is selling on the Gold Coast." Of significance is the fact that neither party adduced any independent evidence of the value of the property at the time the agreement was entered into or subsequent to the agreement.

[7] At the date of the agreement the property had a total area of 10,113m², but part of it was being compulsorily acquired by the Gold Coast City Council for a canal. The parties' intention was that the agreement would apply to the balance area of the property of 8,146m² which remained after the compulsory acquisition.

[8] The applicants were subpoenaed to produce their bank statements for the period June 2009 to May 2010. They produced statements for two accounts, an account described as a pensioner security account (the pension account) which became exhibit 2 and a line of credit account which became exhibit 3.

[9] Mr Street was cross-examined extensively on the bank statements which showed withdrawals far in excess of the pension payments received during the same period. In that year the applicants spent seven or eight months visiting their daughters. (One of the reasons that the applicants spent longer in Victoria in that year was that the applicant was coaching his grandson's cricket team.) When it was suggested to Mr Street that the applicants were providing financial support for one or both daughters, Mr Street denied that, apart from buying household food and goods for the daughter with whom they stayed, and asserted the support was met out of the applicants' pension. There was a lack of frankness in Mr Street's responses and inconsistency with the level of withdrawals from the applicants' bank accounts that made me cautious about his evidence. Each of Mr Street and Mr Ladini had to file a second affidavit that addressed errors in his first affidavit. That was another relevant matter in considering the credit of each of these parties. Although I had some reservations about one particular aspect of the respondent's evidence, there was otherwise a frankness about his answers in cross-examination that, when coupled with supporting documentary evidence, persuaded me that the respondent's evidence was generally more reliable than the evidence of Mr Street. Mrs Street's evidence was limited, but to the extent that it was supportive of Mr Street's evidence, she conceded that she left the financial matters to her husband. Her evidence did not add much to Mr Street's evidence.

The events leading to the agreement

[10] The applicants were in financial difficulty in May 2009. Their line of credit account had a limit of $450,000 that was secured by a mortgage over the property. As at 1 June 2009 the balance of the line of credit was $444,639.76. Mr Street was concerned that the bank may seek to sell the property. The respondent states that the first approach to him was by Mr Street who said he "desperately needed" about $2,000 to $2,500 to pay the rates. The respondent identifies that he paid Mr Street $2,500 in cash from the proceeds of a cheque that he cashed on 5 June 2009. Mr Street denies that a loan of $2,500 was made on the basis that the half yearly rates were for amounts between $500 and $600. What is relevant between the parties is whether the respondent made a payment of $2,500 to the applicants, not whether it was used to pay rates or not. Although the applicants deny this payment occurred, the respondent included the sum of $2,500 in his calculation of the funds paid to the applicants that is recorded in the liabilities section of the balance sheet for his business as a sub-loan under the entry for loan to the respondent. The respondent may have been mistaken about the purpose for which the applicants wanted the funds, but I accept that the respondent has reliably recorded the total payments made by him to the applicants between 2009 and 2011, including the payment of $2,500 made on 5 June 2009.

[11] Around this time Mr Street asked the respondent if he were interested in purchasing the property to stop the bank from selling the property. The respondent was interested, but advised Mr Street that because of the global financial crisis, he did not wish to over extend himself and proposed taking an option to purchase the property. The respondent had available to him $100,000 which he advised Mr Street he was prepared to pay as the option fee to assist the applicants in meeting their mortgage payments and their rates until he purchased the property. Mr Street and the respondent had a number of informal discussions about the proposed transaction. Mr Street asserts that the respondent's offer was to purchase the property by way of "a straightforward sale". The applicants were clearly in financial trouble and the respondent wished to assist them, but he is a shrewd businessman and it is likely that he would assist only without jeopardising his own financial position. I accept the respondent's evidence that from an early stage in his discussions with Mr Street his proposal was that the transaction proceed by way of the applicants' granting the respondent an option to purchase the property and that was acceptable to the applicants on the basis that the immediate payment of $100,000 would relieve them of the pressure they were under from their bank. The respondent described in his oral evidence, and I accept, that Mr Street was concerned that the bank would sell the property for $500,000 to pay out the mortgage and that would leave the applicants with nothing. The respondent set out in his first affidavit that he was told by Mr Street that the bank had valued the property at $1.2m (which Mr Street said was about half the previous value of the property). Mr Street responded in his second affidavit that such a conversation never took place and relied on a letter from the bank that confirmed that no valuation of the property had been undertaken after December 2006. Again, the fact that the bank did not have a valuation is not the point. What is relevant is that Mr Street expressed the fear to the respondent that the bank would sell the property at a low price, in order to persuade the respondent to assist the applicants.

[12] The respondent advised Mr Street that he would have access to funds when a property owned by his daughter at South Coomera was sold. They discussed possible scenarios about timing the respondent's purchase of the property with the sale of the South Coomera land or within a period of two to three years, with an initial payment of $1m and final settlement in five years. The respondent clearly conveyed to Mr Street that there would be a delay of a few years before any purchase was finalised. Although Mr Street denies that the respondent said at this time that he wanted security over the property until settlement by way of a caveat, I accept that it is likely that the respondent did mention that he required a caveat.

[13] The respondent engaged his solicitor Mr Morwood to prepare an option agreement. The respondent arranged to meet with Mr Morwood on 15 June 2009 and Mr Street accompanied the respondent to that meeting. Mr Morwood made handwritten notes at the time of the meeting which formed the basis of a written diary note that was dictated by him after the meeting. The meeting lasted 90 minutes. The general instructions that the respondent gave Mr Morwood were that he was looking to buy the property and the terms were purchase price of $2.5m, deposit of $100,000 to be released immediately with completion in two years with an option to extend for a further one year. Mr Morwood explained to the respondent in Mr Street's presence how put and call options operated. Mr Morwood's handwritten notes include the diagrams that he used to do this. His explanation was detailed.

[14] Mr Morwood also explained to Mr Street that he would not be able to represent the applicants, as he could act for one party only in the transaction. Mr Morwood noted that Mr Street accepted that arrangement and that he would be "getting his own advice" in relation to it. Mr Street asserts that he stated to Mr Morwood that he could not afford to engage a solicitor. That is inconsistent with Mr Morwood's diary note which I consider is more likely to be a reliable record of that meeting than Mr Street's unaided recollection.

[15] The respondent instructed Mr Morwood that Mr Street had offered to allow the property to be used as security, if it were needed for the respondent's proposed development, and that a clause should be included in the contract attached to the put and call option allowing the respondent to settle earlier with a mortgage back to the applicants, if required by the respondent. Mr Morwood also discussed the need for the respondent to lodge a caveat in respect of the property and that the consent of the applicants was required to prevent the lapse of the caveat. Mr Morwood pointed out to the respondent (as is the case) that any caveat over the title to protect the option would not prevent the applicants' bank from selling the property under its mortgage.

[16] Mr Street made some notes for himself following this meeting with Mr Morwood. Those notes (which became exhibit 5) were the Mr Street's way of trying to work out other ways of doing the transaction. He acknowledged that they were not intended to record the discussion at the meeting with Mr Morwood. What is relevant about the note is that it refers to the option period of two to three years and there is a reference to vendor finance.

[17] On 17 June 2009 Mr Morwood sent a letter by facsimile to the respondent which was accompanied by a draft put and call option agreement. The letter stated:

> "To summarize it:
>
> 1. You have an option to purchase the property at 47 Grant Avenue, for $2.5m.
> 2. You pay the option fee of $100,000.00. That option fee is non-refundable. If you exercise the option, then that amount is credited against the purchase price. If you do not exercise the option then the amount remains with the seller.
> 3. You may exercise the option within two years - but you may extend the option period for a further twelve-month period.
> 4. The Sellers also have a right to exercise an option requiring you to purchase the property. They may only do so in the last three days of the option period or if the property at [South Coomera] is sold.
>
> We need some additional details to complete the contract itself. We understand that Mr and Mrs Street will allow some vendor finance but we are unsure as to how long that is for or whether any interest is payable. Can you give us a call to go over this as soon as possible?"

[18] Mr Street went over to the respondent's house after the respondent had received the draft agreement. The respondent gave Mr Street a copy of the covering letter from Mr Morwood and they had further discussions about the proposed transaction.

[19] Mr Street did not have his own copy of the draft agreement, but he looked at the draft at the respondent's house. When Mr Street swore his first affidavit, he had

overlooked the first meeting with Mr Morwood. In that affidavit, he stated that he received "the contract documentation" prepared by the respondent's lawyers which was a put and call option and that he told the respondent that he could not enter into such a long term arrangement and that it was in that context that he stated:

> "The respondent told me that he would pay the sum of $5,000.00 per month for the term of the option in addition to an 'option fee' of $100,000.00. He told me that he was making this payment in order to ensure that my wife and I had sufficient funds to meet our monthly mortgage payments and manage our other financial obligations."

[20] Paragraph 13 of Mr Street's first affidavit then stated:

> "I told the Respondent that we needed to sell the property as soon as possible, but if he was able to assure us that this additional monthly payment would be made until we received final payment of the purchase price, then we would agree to a sale on those terms."

[21] The version in the first affidavit (which is inconsistent with the matters discussed with Mr Morwood on 15 June 2009) was substituted by the version in Mr Street's second affidavit in which he refers to going over to the respondent's house where the respondent showed him the documentation that had been prepared by Mr Morwood and, in relation to the query appearing in Mr Morwood's letter regarding the interest that would be payable, Mr Street states that the respondent said to him:

> "I will pay you monthly instalments of $5,000.00 outside the Contract until settlement. Whatever you do, don't say anything to Barry Morwood about these arrangements - just say that there is no interest."

[22] When Mr Street was cross-examined, he was adamant that the statement made to him by the respondent about $5,000 per month was not an option fee. He stated in evidence:

> "No, it wasn't part of the option fee. The option fee was $100,000, okay? And when I read that letter, Gianni said to me, 'I will pay you cash payments a month $5,000 until – and you tell Mr Morwood that don't – whatever you do, do not mention those payments to him and just tell him there is to be no interest on the document."

[23] The respondent says that after Mr Street looked at the draft agreement, he told him he was happy with it. Arrangements were made by the respondent for the applicants and the respondent to attend at Mr Morwood's office on 18 June 2009. Before the meeting Mr Morwood spoke by telephone with the respondent who instructed that there would be no interest payable on the loan by way of vendor finance which would be for five years and that completion of the contract after the option was exercised was to be within 60 days. Mr Morwood also spoke to Mr Street who was at the respondent's house on the respondent's telephone and who confirmed those details.

[24] Both applicants attended with the respondent on Mr Morwood later on 18 June 2009. This meeting also lasted about 90 minutes. Mr Morwood again confirmed that he was acting on behalf of the respondent and was not acting on behalf of the applicants. In another extensive diary note, Mr Morwood recorded that the applicants "wished to act for themselves but may in due course consult a solicitor about it." Whilst the applicants were present, Mr Morwood explained in detail to

the respondent the operation of the agreement. The respondent informed Mr Morwood that he wanted to be sure that the agreement was binding.

[25] The applicants and the respondent signed the agreement in Mr Morwood's presence and the respondent handed a cheque to the applicants for $100,000. Mr Morwood informed the applicants that he would be sending them a letter enclosing a caveat and requesting them to sign the consent. The respondent had another matter on which he wished to consult Mr Morwood. Mr Morwood recorded in his diary note that the applicants then left the meeting and he had a further discussion with the respondent alone.

[26] The applicants allege that the respondent went down to the car park with them, opened the boot of his car and took out $5,000 in cash and handed it to them saying it was the first monthly payment. In his second affidavit Mr Street stated that as the respondent opened the boot, he pulled it down slightly and looked up towards Mr Morwood's office and said "I better make sure that Barry is not watching us." Mr Street asserts that the sum of $5,000 was subsequently spent paying bills and meeting living expenses.

[27] The respondent states that the applicants left the meeting in Mr Morwood's office and that he stayed with Mr Morwood to talk about another matter. The respondent denies giving $5,000 in cash to the applicants in the car park on 18 June 2009. He states that he does not keep money in the boot of his car.

The agreement

[28] Under the agreement, in consideration of the call option fee of $100,000, the applicants granted to the respondent an option to purchase the property for $2.5m and on the conditions set out in the attached contract. The option period was two years from the date of the agreement, but could be extended by the respondent for a further one year, on giving notice of extension in writing before the last three days of the first two years of the option period. Upon exercise of the option, the call option fee of $100,000 would form the deposit under the contract. If the respondent does not exercise the call option, the option fee of $100,000 is non-refundable.

[29] Under the put option, the applicants could require the respondent to purchase the property on the same conditions set out in the attached contract, but the put option could be exercised only within either the last three business days of the option period or at any time after the completion of the South Coomera property. Settlement of the purchase is to be 60 days from the date of the contract. A special condition in the contract provides for the sum of $1m to be paid on completion and provides for the balance of the purchase price ($1.4m) as follows:

> "The balance of the purchase price shall be lent by the Seller to the purchaser on an interest free loan for the period of 5 years and secured by a registered second mortgage on such reasonable terms as the Seller's lawyers usually adopt in such mortgages. The second mortgage shall be subject to a first mortgage which is limited to secure the sum of $1,000,000.00."

The events subsequent to the agreement

[30] The applicants deposited the respondent's cheque for $100,000 to their line of credit on 18 June 2009.

[31] On 19 June 2009 the applicants withdrew $3,000 from their line of credit. They withdrew another $6,000 on 30 June 2009. (This does not reconcile easily with Mr Street's assertion that the cash payment of $5,000 which came from the boot of the respondent's car was spent paying bills and meeting living expenses.)

[32] The respondent states that he was visited by Mr Street later in the same week that the agreement was signed and that Mr Street told him that they had "family dramas with our daughter and we're going to Melbourne. We will pay the $100,000 to help her but we also need some money to help ourselves out and with the bank." The respondent said that he told Mr Street he could help him with $5,000 and would do whatever he could to help them, but it would depend on what his circumstances were. The respondent also said that he informed Mr Street that he needed to write down a list of the money that the respondent gave him, so that it could be sorted out when the contract settled and Mr Street agreed to that. Mr Street denies in his second affidavit that these conversations took place and asserts there were no "family dramas." In cross-examination, Mr Street conceded that he did tell the respondent that there were family dramas with one of his daughters and that the applicants were going to Victoria to help her out, but denied that they had the conversation at that point in time about the respondent paying $5,000 per month. Mr Street stated that the family drama was his daughter fracturing her elbow when she fell off a horse, although Mrs Street thought that had occurred in 2008,

[33] Mr Morwood sent a letter to the applicants dated 23 June 2009 requesting them to sign the consent to the caveat proposed to be lodged by the respondent in respect of his equitable interest in the property under the agreement. The consent was signed by both applicants in Victoria on 3 July 2009. The caveat was lodged on 8 July 2009 by Mr Morwood.

[34] Mr Street has annotated the line of credit bank statements to show when deposits of cash were made from funds provided to the applicants by the respondent. Part of a cash payment of $5,000 was deposited to the line of credit in July 2009. A further cash deposit was made to the line of credit in August 2009 that is noted to be from a payment of $5,000 from the respondent. Another deposit was made in September 2009 that is shown as being part of a $5,000 cash payment. A further cash deposit made on 30 September 2009 is also shown as being from a cash payment of $5,000. Another $3,000 cash deposit on 5 November 2009 is also shown as being from a cash payment of $5,000.

[35] The respondent made a direct deposit of $5,000 to the pension account on 31 December 2009. (It appears that on 4 January 2010 the applicants withdrew $3,000 from the pension account and deposited that to the line of credit.) Another direct deposit to the pension account was made by the respondent on 18 January 2010. Mr Street collected $5,000 in cash from the respondent on or about 9 March 2010 (which is described in the schedule of payments as the late payment for February 2010) after returning from Victoria to check on the property and collect that payment, and a cash deposit of part of those funds was made to the pension account on that date. The respondent made a cash deposit of $5,000 to the pension account on 6 April 2010. (It appears that on 7 April 2010 the applicants withdrew $5,000 from the pension account and deposited that to the line of credit.)

[36] The applicants recorded an additional cash payment of $5,000 for March 2010 in the schedule of payments that does not correlate with any entry in the pension

account or the line of credit. The respondent agrees, however, with the applicants' calculation in the schedule of payments that the total amount paid by the respondent to the applicants was $68,000, subject to the addition of the sum of $2,500 paid by the respondent to Mr Street on 5 June 2009.

[37] Mr Street states that in April 2010 the respondent told him that he was having difficulties with his restaurant and had been unable to sell any of his properties including the property at South Coomera and asked the applicants to use their line of credit to make their mortgage payments, until the respondent could resume his monthly payments.

[38] The respondent states that when Mr Street visited him in October 2010 he asked for help making the mortgage payments and told him that they were about $3,000 each month. The respondent asked Mr Street for a mortgage statement to verify the amount of the mortgage payment and after 10 November 2010 Mr Street gave him a document entitled List of Transactions for the applicants' line of credit which showed the line of credit was almost at its limit again, as the debit balance on 10 November 2010 was $449,333. The interest rate was recorded on the document as 7.41% per annum. The document has a handwritten annotation that the monthly payment was $2,832 and states "needs to be cleared 5 days before end of month." Mr Street explains the resumption of monthly payments for the lesser amount of $3,000 per month on the basis that he telephoned the respondent in October 2010 and said that the applicants no longer had the capacity to pay the mortgage payments from the line of credit and that the respondent said he would make reduced monthly payments of $3,000 each.

[39] Within 17 months after receiving the option fee of $100,000, additional payments from the respondent of at least $53,000, and pension payments of approximately $34,000, the line of credit had returned to a similar debit balance to that which it had before the deposit of the option fee.

[40] The respondent made a payment of $3,000 to the applicants in each of the months between October 2010 and March 2011.

[41] The applicants consulted their current solicitors in May 2011 in relation to the agreement and the respondent's failure to make monthly payments to them. The applicants' solicitors by letter dated 31 May 2011 to the respondent alleged that $120,000 was due by May 2011 in 24 monthly payments of $5,000 each and that, as only $68,000 had been received from the respondent, demand was made for the balance, alleged to be $52,000, or the applicants would terminate the agreement. A schedule of payments was enclosed with that letter that sets out the payments summarised above, commencing with the cash payment of $5,000 in July 2009.

[42] On 2 June 2011 the respondent's solicitor served a notice from the respondent extending the option period by a further year on the basis that was permitted under the definition of "option period" in the agreement. The respondent's solicitor by letter dated 9 June 2010 to the applicants' solicitors set out the respondent's instruction that the funds that were set out in the schedule of payments were loans made by the respondent to the applicants and repayable on demand.

[43] By letter dated 5 July 2011 to the respondent's solicitor, the applicants' solicitors gave notice of the applicants' termination of the agreement on the basis of the

respondent's failure to remedy his default under the agreement by making the balance of monthly payments that had been demanded in the letter of 31 May 2011.

Was there an additional oral term to the agreement?

[44] The validity of the notice of termination given by the applicants depends on whether the applicants can prove that there was an additional oral term to the agreement that the respondent would pay $5,000 per month to the applicants for the life of the option period, in addition to the option fee of $100,000.

[45] The respondent attacks Mr Street's credit because of the different versions given by him, both as to the content of the additional term and the timing of it. In addition there appears to be confusion on Mr Street's part about whether the payment was additional consideration for the applicants entering into the agreement or to cover interest under the proposed vendor finance. The respondent relies on the discrepancy in the schedule of payments prepared by Mr Street that does not include the payment of $5,000 claimed to be made on 18 June 2009 from the boot of the respondent's car. (The making of such a payment was alleged by the applicants' solicitors, however, in their letter dated 31 May 2011 that accompanied the schedule of payments.)

[46] The applicants submit that the reason that the oral term was not included in the agreement was that the respondent did not want that part of the arrangement revealed to his solicitor. The applicants submit that the respondent acted in a way consistent with the oral term by making monthly payments of $5,000 that commenced on the day the agreement was signed and were repeated on nine further occasions until the respondent himself was having financial difficulties which explains why, when the respondent resumed making monthly payments, they were at the reduced rate of $3,000 per month.

[47] I have concluded that it is unlikely that the respondent would have agreed, in a binding way, to pay to the applicants any sum that could be characterised as either interest or a fee for the option agreement that was not documented. There was a flavour to Mr Street's evidence that in some instances he was recalling what he wished for, rather than what happened. It is relevant to my conclusion that the respondent was keen to ensure that the agreement was binding and sought the advice and assistance of Mr Morwood. As the respondent proposed to develop the property with his property, he would not have agreed to make any payment in a way that would deprive him of any potential business benefit from making that payment. After being so careful to involve Mr Morwood in the preparation of the agreement, I am satisfied that the respondent would not have jeopardised the efficacy of that agreement by agreeing on an additional oral term that was not to be included in the agreement. There was also confusion on the part of Mr Street about the nature of the payment that he alleged the respondent had agreed to make to the applicants. I was unconvinced by the applicants' evidence about the payment of $5,000 cash from the boot of the respondent's car on 18 June 2009. If Mr Street and the respondent had agreed on the alleged additional term, it did not require payment to be made on the day the agreement was signed. It is also inconsistent with the immediate withdrawal by the applicants of $3,000 from the line of credit.

[48] Apart from the financial pressure of the line of credit almost reaching its limit in May 2009, the applicants did not disclose in the course of this proceeding that they

had any other financial difficulties at that time. When they were cross-examined on whether they were using their funds to assist financially one or both of their daughters (which they denied apart from living expenses whilst staying with one of the daughters), they did not disclose any other reason for a drain on their finances subsequent to the agreement. The evidence was unsatisfactory in that exhibits 2 and 3 showed that in the 12 months ending 31 May 2010 the applicants withdrew $110,000 from their accounts, without taking into account the interest payments under the line of credit and bank fees. Their expenditure was substantially beyond their income from the pension.

[49] When the respondent entered into the agreement his interest then coincided with the applicants in ensuring that the applicants did not default under the line of credit. The respondent's caveat could not stop the applicants' bank from exercising its power of sale as mortgagee, if the applicants defaulted in respect of the line of credit.

[50] Although the respondent was no doubt motivated in assisting the applicants in the first place by the advantage in securing for himself the development potential of or right to develop the applicants' property in the future, he also was sympathetic as a friend to the applicants' financial distress. I find that sympathy continued after the agreement was entered into. It was also in the respondent's interest to ensure that he did not lose the benefit of the option fee. I accept the respondent's version that after the agreement was signed, there was a further approach by Mr Street for additional assistance.

[51] The one significant reservation I have about the respondent's evidence is that I consider that it is likely he conveyed to Mr Street that he would provide the further assistance asked for by Mr Street to the extent he could (and therefore in a non-binding way) by regular payments of $5,000 per month. That explains the regularity with which the payments were initially made and the special trip that Mr Street made in March 2010 to collect the payment. It also explains why there was no negotiation between the parties about the continuation of the payments when the respondent was unable to continue making them after April 2010, as the assistance depended on the respondent's capacity to give it. The fact that when the respondent was in a position to provide further financial assistance to the applicants in October 2010 he requested confirmation from the applicants as to the amount of the monthly interest payment under the line of credit is also consistent with the respondent's version that he was making the payments requested of him by Mr Street by way of assistance rather than any contractual obligation. Consistent with the informal arrangement about the making of these payments, the respondent has recorded the payments in his records as loans. The respondent was in the position that when he exercised the option, he would be able to recover the amount of these loans from the payment that he was due to make for the purchase of the property.

[52] The applicants have failed to prove there was an additional oral term to the agreement made in the terms and at the time alleged by the applicants.

Was the agreement procured by the respondent's unconscionable conduct?

[53] The applicants submit that the circumstances in which they entered into the agreement with the respondent bring them within the category of case where equity will set aside the agreement because of the unconscionable conduct of the

respondent, as explained in *Blomley v Ryan* (1956) 99 CLR 362, 404-405 and 415 (*Blomley*), *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 and 474 (*Amadio*) and *Bridgewater v Leahy* (1998) 194 CLR 457 at [74]-[75] (*Bridgewater*).

[54] The nature of the equitable jurisdiction to relieve against unconscionable conduct was described by Kitto J in *Blomley* at 415:

> "It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands."

[55] Fullagar J observed in *Blomley* at 405:

> "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other."

Fullagar J also explained the relevance of inadequacy of consideration at 405:

> "But inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways- firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion."

[56] The focus of the jurisdiction is on the conduct of the stronger party in taking advantage of the weaker party. That is why the applicants in the circumstances of this matter bear the onus of showing that the respondent took advantage of them in the transaction.

[57] The submissions made on behalf of the applicants emphasise that the agreement was "grossly improvident" for the applicants. The difficulty with that submission is that the applicants have failed to adduce sufficient evidence to support the conclusion that the agreement was grossly improvident. The applicants' focus for the purpose of the submission is the aggregate period of eight years 60 days which it could take for the purchase and pay out of the vendor finance to be completely finalised, if the respondent chose to use the maximum period allowed by the agreement to complete the entire transaction. Although delays in finalising payment of the purchase price affect the true value of the transaction, particularly where the vendor finance for $1.4m is without interest, there is no valuation of the land against which to compare the value of the transaction or evidence of the conditions on which the applicants would otherwise have been able to sell the property to a third party in June 2009. In the absence of evidence of this nature, it is also not appropriate to conclude that the long term nature of the entire transaction is improvident merely because of the ages

of the applicants. It is not irrelevant that the applicants initiated the transaction with the respondent: cf *Bridgewater* at [119].

[58] The applicants rely on three factors to show that they were the weaker party to the transactions: the applicants' age, infirmity and the lack of assistance or explanation given to them about the transaction where assistance or explanation was essential. The applicants did not specifically rely on financial need.

[59] The applicants did not adduce any specific evidence about their medical conditions that would suggest their age or health put them at a disadvantage in dealing with the respondent. There was nothing in their evidence to suggest they were ailing, despite the hip replacement that Mr Street had in 2007 followed by a stroke and his heart problems. In fact, Mr Street was able to coach his grandson's cricket team while in Victoria in 2010. The respondent was familiar with the ages of the applicants and their state of health. Prudently the respondent wanted to have his transaction with the applicants documented to protect his interests. The age and/or infirmity of the applicants did not in the circumstances, however, put them at a special disability in dealing with the respondent.

[60] To the extent that the applicants rely on the lack of independent assistance or explanation given to them about the transaction to give them a special disability in their dealings with the respondent, they had the time and opportunity to seek their own advice about the transaction. Mr Morwood made it clear at the meeting on 15 June 2009 that he was not acting for the applicants, but for the respondent. Mr Street on behalf of the applicants did not take advantage of the opportunity after that meeting to seek his own advice. There was no conduct on the part of the respondent that prevented the applicants from seeking their own advice. It is the opportunity for assistance that is important: *Bridgewater* at [100]. The failure of the applicants to seek independent assistance or explanation, despite the opportunity to do so, did not place them at a special disability in dealing with the respondent.

[61] The applicants rely on the evidentiary onus that shifts to the stronger party in the transaction to show that it was fair, just and reasonable, when *prima facie* relief against unconscionable conduct has been established: *Blomley* at 428-429 and *Amadio* at 474. For the reasons set out above, I am not satisfied that the applicants have shown that they were at any special disability in dealing with the respondent that was known to the respondent in such a way as to make the agreement *prima facie* unconscionable for the respondent accept the benefit of the agreement.

[62] The applicants have failed to prove the agreement was procured by the respondent's unconscionable conduct.

[63] To the extent that the applicants sought to claim that the respondent is estopped from relying on the rights conferred by the agreement, the factual findings made against the applicants dispose of that alternative claim.

Orders

[64] It follows that the application must be dismissed. Subject to any submissions the parties wished to make on costs, I propose that costs should follow the event which would result in an order that the applicants pay the respondent's costs of the application to be assessed.