SUPREME COURT OF QUEENSLAND

CITATION:	*ATB Morton Pty Ltd v Sentinel Property Group Pty Ltd* [2015] QSC 180
PARTIES:	**ATB MORTON PTY LTD** ACN 002 684 620 (applicant) **v** **SENTINEL PROPERTY GROUP PTY LTD** ACN 149 805 489 (respondent)
FILE NO/S:	SC No 5550 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2015
JUDGE:	Douglas J
ORDER:	**1. Upon the usual undertaking as to damages by the respondent, the applicant's originating application filed 5 June, 2015 is dismissed.** **2. The respondent shall, within 14 days of the date of this order, provide a bank guarantee to the court in the sum of $250,000 in favour of the registrar of the Supreme Court of Queensland, Brisbane Registry in a form satisfactory in all respects to the registrar.** **3. The costs of the application are reserved to the proceeding to be commenced by the respondent against the applicant within 14 days of the date of this order.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – AGREEMENTS CONTEMPLATING EXECUTION OF FORMAL DOCUMENT – WHETHER CONCLUDED CONTRACT – where the applicant sought to remove a caveat claiming an equitable interest in property being an unregistered option to purchase granted by the registered owner – whether the caveat removal application raised questions of fact for determination at a trial

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – SERIOUS QUESTION TO BE TRIED – GENERALLY – where the applicant sought to remove a caveat claiming an equitable interest in property being an unregistered option to purchase granted by the registered owner – whether there was a serious question to be tried as to whether the exchange of correspondence between the parties constituted an enforceable contract – whether there was a serious question to be tried as to whether there had been an election by the respondent to forgo any rights to specific performance of the contract alleged by the conduct of its employees – whether the alleged unsuitability of the respondent's undertaking as to damages justified removal of the caveat

Property Law Act 1974 (Qld), s 59

Factory 5 Pty Ltd v Victoria (2010) 276 ALR 523; [2010] FCA 1229, considered
GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631, considered
Masters v Cameron (1954) 91 CLR 353, considered
Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd [2009] QCA 60, considered
Todrell Pty Ltd v Finch (No 1) [2008] 1 Qd R 540; [2007] QSC 363, considered

COUNSEL:	M D Martin QC for the applicant D G Clothier QC for the respondent
SOLICITORS:	Mills Oakley Lawyers for the applicant Russells for the respondent

Background

[1] This is an application to remove a caveat claiming an equitable interest in property being an unregistered option to purchase granted by the registered owner pursuant to:

> "(a) a written offer by the Caveator to the Owner to acquire an option to buy the property (more particularly described in Item 2 of this Caveat) dated 31 March 2015 and transmitted to Stewart Gamblin, the owner's agent; and
>
> (b) the Owner's acceptance in writing of the Offer, by the Agent in his email dated 1 April, 2015 at or about 8:23am to the Caveator."

[2] The two documents referred to in the caveat as constituting the agreement contained what was described as a "revised expression of interest" in the offer letter of 31 March 2015 in these terms:

> "Further to our ongoing discussions regarding the ATB Morton Portfolio located in Paget, Queensland and the preliminary information provided, we

have revised our offer dated 23 March 2015 of $12,500,000 and formally present our revised offer of $13,100,000 for the purchase of the following properties:

- 33-41 Diesel Drive, Paget Qld; and
- 37-39 Interlink Court, Paget Qld.

By way of background, Sentinel Property Group commenced business in early 2010 and has since purchased 34 separate properties in Queensland, New South Wales and Victoria, worth approximately $750 million. We have recently settled two Neighbourhood Shopping Centres in regional Queensland for $33.0 million, a Brisbane CBD Fringe Commercial building for $62 million and a Shopping Centre in Townsville last month for $11 million. We are keen to expand our existing holdings (which currently comprise four commercial properties) in Mackay and we note that we recently settled on an industrial facility in Paget for $9.8 million in October 2014. Of the 34 properties mentioned above, 11 are industrial properties, with industrial assets continuing to be a core focus for the Group.

Our revised offer is as follows:

Purchase Price:	$13,100,000 (Thirteen Million One Hundred Thousand Dollars) as a going concern.
Deposit:	$300,000 payable on exercise of Call Option.
Purchaser:	Sentinel Property Group (or Nominee).
Purchaser's Solicitor:	Stacey Ebert, Sentinel Property Group.
Form of Offer:	Call Option to purchase with unconditional Contract of Sale attached.
Due Diligence:	40 days from receipt of all information including but not limited to: • audited and budgeted outgoings; • arrears schedule, including history; • copies of rates notices; • land tax assessment; • structural due diligence reports; • certificates of classification/occupancy; • all service contracts and records; • electricity supply contracts; and • binding contractual obligation between Sentinel Property Group and the Vendor.
Finance:	21 days after completion of Due Diligence.

Settlement:	14 days after Finance approval.
Other Conditions:	The Vendor will provide a cash adjustment at settlement to cover all existing tenant/new deal incentives existing at the date of settlement which have not been paid or satisfied before settlement. All arrears are to be written off as at settlement of the property.

Sentinel continues to receive ongoing support from investors and financiers. Should the Vendor require confirmation of our capacity from our Financiers, this can be supplied on short notice.

We have the ability to move quickly and should the vendor be receptive to our offer, we look forward to receiving confirmation."

[3] The email of 1 April 2015 from the applicant's agent to individuals at the respondent was as follows:

> "Congratulations on receiving agreed terms as per your emailed EOI yesterday for the acquisition of the two industrial investments.
>
> ATB Morton's legal counsel will be in touch shortly to co-ordinate the preparation of the contracts.
>
> If you have any questions in the interim, please do not hesitate to call."

[4] The applicant's argument that the caveat should be removed was that the offer referred to a call option but was silent as to when the option commenced. Further the period of the option was conditional upon a non-specific due diligence procedure and the availability of a loan from a financier, so that, in the absence of a commencement date and duration for the option and specificity of the due diligence procedure, the contract was not sufficiently certain. As a corollary it argued that there was no sufficient memorandum of the alleged agreement for the purposes of s 59 of the *Property Law Act* 1974 (Qld) because the document relied on did not contain all the essential terms of the bargain in circumstances where the apparent objective intention of the parties was not to make a concluded bargain until they executed a formal contract.

[5] The applicant also argued, based on further evidence, that the respondent had elected to accept the applicant's repudiation of any agreement so that its only remedy was in damages. Finally, the applicant argued that the respondent had not demonstrated the adequacy of its undertaking as to damages.

[6] No form of call option or unconditional contract was attached to the expression of interest dated 31 March 2015, something the applicant relied on in respect of its argument that the agreement asserted was uncertain. There were further dealings between the parties, however, on which the respondent seeks to rely in respect of events both before the alleged agreement and after it to strengthen its argument that the documents did form a concluded and certain agreement.

[7] It is clear that the parties had been negotiating for some time, since August 2014. The evidence suggests that the expression of interest of 31 March 2015 came at the end of a more protracted period of negotiation during which there had been negotiation over terms and the price proposed where the applicant's agent advised the respondent at 11.52 am on 31 March 2015 that the applicant had internal approval to sell at $13.1 million. That appears to have produced the expression of interest which was sent at 4.45 pm on 31 March 2015. The email in response came early the next morning at 8.23 am.

[8] Subsequently, from evidence on which the respondent would rely if the matter goes to trial, it is clear that there were further dealings between the parties. There is evidence that the applicant's agent said that the applicant was preparing contracts. He also discussed a possible heads of agreement with Mr Kent of the respondent who said it was unnecessary provided finalisation and execution of the call option occurred quickly over the Easter break between 3 and 6 April 2015.

[9] Subsequently, on 8 April 2015, the applicant's agent said that its in-house counsel had begun preparing contracts which would be due for review the following week. He also said that the applicant could sign a heads of agreement and would commence its information request on receipt of the respondent's due diligence request document. The respondent's in-house lawyer became involved and Mr Kent provided a draft heads of agreement to the applicant's agent by email on 8 April 2015 which, arguably, followed the terms of the expression of interest.

[10] There were further dealings between the parties apparently progressing the sale and dealing with an issue that had arisen about a tenant of one of the properties having a right of first refusal clause in its lease. As part of the dealings, Mr Kent of the respondent sent the applicant's agent a copy of the respondent's standard call option deed which was simply a pro forma document not adapted for this particular case.

[11] The due diligence process continued until 24 April 2015 when the applicant's agent emailed Mr Kent of the respondent at 10:57 am to the effect that the applicant had revised its position and instructed the agent to sell at $13.5 million rather than $13.1 million.

[12] The respondent's in-house lawyer, Ms Stacey Ebert, expressed her disappointment and reserved its rights in an email of 11:58 am on 24 April which she copied to Mr Kent. Mr Kent says in his affidavit that he told the applicant's agent of his extreme disappointment, apparently after that email, and said that he wanted to progress at the agreed price of $13.1 million; see para 34.

[13] At 7:16 pm on 24 April 2015 Mr Warren Ebert of the respondent said in another email to a Mr Rathbone of the applicant, headed "Without Prejudice", "… we acknowledge your termination of the deal and while this is disappointing, we have reserved our rights in this matter". At 9.19 pm on 24 April 2015, Mr Ebert again emailed the applicant's agent saying "Pls confirm we have acknowledged the termination of the deal. 'And reserved our rights' …".

Was there a contract?

[14] Mr Martin QC for the applicant argued that the lack of specificity about the commencement date of the option and its duration meant that there was no agreement about terms essential to the bargain, namely the option period and the due diligence procedure which he criticised as being uncertain, partly because of its open ended nature. He relied in particular on the fact that the document was described as a call option rather than the put and call option referred to in *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd*,[1] where the court formed the view that the option referred to there was to be exercised within a reasonable time. He also drew my attention to the fact that the expression of interest document did not contain any provision for acceptance on its face, such as a space for signing on behalf of the respondent.

[15] Mr Clothier QC, for the respondent, argued that the proper construction of the document led to the conclusion that the option would be exercised at the latest by the end of the finance period described in it and that a court would imply a reasonable period for the performance of the due diligence process to govern the issues that might be affected by the phrase "40 days from receipt of all information …" in the expression of interest. He also relied on the reference to "agreed terms" in the email of 1 April 2015, the absence of a reference to any need to negotiate further terms and the proposal that contracts simply be prepared rather than be the subject of further negotiation. He submitted that the negotiation or preparation of a more formal document would constitute the performance of that agreement.

[16] He pointed out that the parties had embarked on the due diligence process and argued that the email response of 1 April 2015 did not refer to any further matters that were to be agreed but simply spoke about coordination of the preparation of contracts. He also argued that the heads of agreement that were produced later in April were produced only after the applicant had done nothing by that time.

[17] Mr Martin also relied upon a decision of Chesterman J in *Todrell Pty Ltd v Finch (No 1),*[2] particularly at [115]-[119] where his Honour, dealing with the facts of that case and the option agreements there in play, pointed out that they could not have taken effect until the signing of a relevant deed to which the expiration date of the options referred. His Honour concluded from that that the parties did not intend to be bound until execution of the formal agreements. Alternatively, he said that the agreements were uncertain until execution because there was no agreement about a critical term, the option period, until its commencement was fixed by execution by the grantor.

[18] Mr Clothier sought to distinguish that decision on the basis that the parties there objectively intended to be bound only when the formal document was executed. He submitted that the implied obligation of each party to cooperate with each other to ensure that each side obtained the benefit of its bargain served to supply insufficiencies that Mr Martin submitted existed in respect of the formation of any contract in this case.[3]

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1 [2009] QCA 60.
2 [2008] 1 Qd R 540.
3 See *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60 at [34] and *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631.

Similar concerns arose, he submitted, in respect of the argument that there was no sufficient memorandum of any agreement.

[19] Mr Martin relied upon his argument that essential terms had not been agreed to support the submission that there was not a sufficient memorandum of the agreement. He also submitted that this was a case within the third class referred to in *Masters v Cameron*,[4] namely that the objective intention of the parties was not to make a concluded bargain until a formal contract was executed.

[20] Mr Clothier submitted that this was a "fourth class" *Masters v Cameron* agreement where the parties were content to be bound immediately and exclusively by the terms which they had agreed upon while expecting to make a further or formal contract in substitution for the first contract containing, by consent, additional terms.[5] In that context, he argued that his client, the respondent, could rely upon the post agreement communications and conduct of the parties.

Repudiation and election

[21] Mr Martin argued that the evidence of the respondent's behaviour on 24 April 2015, to which I have referred earlier, constituted an acceptance by the respondent of any repudiatory conduct by the applicant and an election by the respondent to terminate the agreement. The argument against that was that the conduct was at best equivocal and that it was necessary to show more than that to establish that an election had occurred.

[22] The respondent argued that the emails were equivocal in themselves and more so because of the evidence that Mr Kent wished the agreement to proceed and because Mr Ebert's language did not amount to an acceptance of the repudiation but, rather, simply acknowledged it. Mr Clothier pointed to the "without prejudice" heading to one of the emails from the respondent relied on by the applicant in which the respondent, through Mr Ebert, had said "we acknowledge your termination of the deal and while this is disappointing, we have reserved our rights in this matter". He argued that that was not the language of acceptance of the termination, was the language of a lay person, not a lawyer and was not an unequivocal election when compared with what had been said by Mr Kent to the applicant's agent. Nor had it been shown that the respondent should be bound by anything said by Mr Ebert.

Adequacy of an undertaking as to damages

[23] The applicant criticised the evidence of the respondent on the issue of the undertaking as to damages it offered should the caveat remain in place pending any trial of the action. A balance sheet current to 31 May 2015 reveals that the respondent has $6,245,404 net assets but $4,352,303 of those are related party loans about which little detail is provided in the evidence of Ms Vine, the Chief Financial Officer of the respondent.

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4 (1954) 91 CLR 353, 360.

5 See, eg, *Factory 5 Pty Ltd v Victoria* (2010) 276 ALR 523; [2010] FCA 1229 at [5], [83]-[84].

[24] She does say, however, that the current assets of $545,846 shown in the recent balance sheet are at the lower end of the spectrum and that, in recent months, that figure has been in the region of $1.2 to $1.3 million. She also says that financial assets shown as non-current assets worth $1,109,500 relate to a fund offered to the public in December 2014, units in which can be transferred or sold at any time.

[25] She also says that the respondent has an overdraft facility with the Commonwealth Bank of Australia of $1 million which is currently drawn to just over $188,000 and is usually in credit, was only established in May 2014 and was not drawn on in the period to December 2014 to 3 June 2015. The respondent, in addition, offered a bank guarantee in the sum of $250,000 in support of the usual undertaking as to damages it offers.

Should the caveat be removed at this stage?

[26] The argument for the respondent in this case is that the disputed issues raise questions of fact for determination at a trial which will require an examination of the dealings both before and after the contract in so far as they bear on the intention of the parties in an objective sense. Mr Clothier submitted that it was inappropriate for me to determine on a caveat removal application that no binding agreement had been reached because it was neither possible nor appropriate to do that on this material. He argued that the facts need to be amplified by reference to additional facts, including conversations, some of which are deposed to in the affidavit of Mr Kent, for example, in circumstances where it is not yet clear whether the applicant disputes some or all of those facts.

[27] The arguments I have canvassed seem to me to establish that there is at least a serious question to be tried as to whether the exchange of correspondence on 31 March 2015 and 1 April 2015 constituted an enforceable contract. It also seems to me to be a serious question whether there has been an election by the respondent to forgo any rights to specific performance of the contract alleged by the conduct of its employees. It would not be appropriate to resolve those issues at this stage unless I believed that my decision would not be affected by further evidence at such a trial. I am not of that view.

[28] Nor do the applicant's concerns about the undertaking as to damages persuade me that the caveat should be removed at this stage. The respondent appears to be an established business, to have significant assets and an ability to raise further funds if needed. The support of its undertaking in the usual form by the bank guarantee offered persuades me that I should not remove the caveat at this stage.

[29] The possible delays associated with further litigation of these issues do not persuade me that the respondent should fail on the balance of convenience. The respondent did not point to any other particular prejudice it might suffer.

Conclusion and orders

[30] On the respondent providing the usual undertaking as to damages supported by its further undertaking to provide a bank guarantee in the sum of $250,000 in support of that undertaking within 14 days in a form suitable to the registrar I shall dismiss the

application to remove the caveat at this stage. The matter should proceed to trial and directions should be made to expedite that process as quickly as possible.

[31] I shall hear the parties further as to the form of the order and costs.

[32] Accordingly, I shall make the following orders:

1. Upon the usual undertaking as to damages by the respondent, the applicant's originating application filed 5 June, 2015 is dismissed.

2. The respondent shall, within 14 days of the date of this order, provide a bank guarantee to the court in the sum of $250,000 in favour of the registrar of the Supreme Court of Queensland, Brisbane Registry in a form satisfactory in all respects to the registrar.

3. The costs of the application are reserved to the proceeding to be commenced by the respondent against the applicant within 14 days of the date of this order.