SUPREME COURT OF QUEENSLAND

CITATION:	*JLF Corporation Pty Ltd v Matos* [2016] QCA 355
PARTIES:	**JLF CORPORATION PTY LIMITED** ACN 010 231 222 (appellant) **v** **JOEL MARIO MATOS** (respondent)
FILE NO/S:	Appeal No 3338 of 2016 SC No 1498 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court Brisbane – [2016] QSC 32
DELIVERED ON:	23 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2016
JUDGES:	Fraser and Gotterson and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERs:	**1. Allow the appeal.** **2. Set aside the declarations and orders made in the Trial Division.** **3. Dismiss the originating application.** **4. Order that the respondent pay the appellant's costs of the appeal and the costs of the application in the Trial Division.**
CATCHWORDS:	CONVEYANCYING – OPTIONS – where the respondent purchased property from the appellant – where the respondent and the appellant entered into a Put Option Agreement whereby the appellant agreed to purchase back the property if the respondent sent a contract contained in a schedule prior to a certain date – where the respondent sought to exercise the put option – where the respondent used the tenth edition of the REIQ/Queensland Law Society standard form contract in lieu of the eighth edition of the contract attached to the Put Option Agreement – where the primary judge held that the respondent validly exercised the put option contained in a written Put Option Agreement between the respondent and the appellant dated February 2012 – where the appellant argued that the exercise

of the put option was invalidated by the delivery of the tenth edition of the standard form contract rather than the edition contained within the Put Option Agreement – where the respondent submitted that the primary judge's conclusions were correct – whether upon the proper construction of the Put Option Agreement, it required, for the valid exercise of the put option, that the respondent deliver a contract in the form of the eighth edition of the REIQ/Queensland Law Society standard form

Property Agents and Motor Dealers Act 2000 (Qld)
Property Occupations Act 2014 (Qld), s 1, s 160, s 165

Matos v JLF Corporation Pty Ltd [2016] QSC 32, related
Phillips Fox (A Firm) v Westgold Resources NL [2000] WASCA 85, cited
Quadling v Robinson (1976) 137 CLR 192; [1976] HCA 31, cited

COUNSEL: G Gibson QC, with P D Hay, for the appellant
M J Lawrence for the respondent

SOLICITORS: Enyo Lawyers for the appellant
No appearance for the respondent

[1] **FRASER JA:** After a contested hearing the primary judge made declarations that on 16 December 2014 the respondent validly exercised the put option contained in a written Put Option Agreement between the respondent and the appellant dated February 2012, and that on the same day a valid and binding Contract of Sale was entered into by the respondent as seller and the appellant as purchaser for the sale of the identified property upon identified terms.

[2] The notice of appeal against those declarations contains two grounds but the appellant pursued only the ground that the primary judge erred in holding that the respondent validly exercised the put option. The appellant described the only issue in the appeal as being whether, upon the proper construction of cl 2.4 of the Put Option Agreement, that agreement required for the valid exercise of the put option that the respondent deliver a contract in the form of the eighth edition of the Real Estate Institute of Queensland (REIQ)/Queensland Law Society standard form to the appellant or whether it required the option to be exercised by the respondent delivering to the appellant a contract in the form of the tenth edition. Other issues were litigated at the hearing before the primary judge but the appellant did not challenge the primary judge's decision to resolve those issues in favour of the respondent.

[3] The Put Option Agreement was made between the parties in connection with a contract made in December 2011 by which the respondent purchased a house and land from the appellant as an investment property. By cl 2.1 of the Put Option Agreement, the appellant acknowledged receipt of a put option fee of $1.00 from the respondent. There followed these provisions:

> "2.2 In consideration of the put option fee, JLF grants to Owner an option to sell the Property to JLF on the terms set out in the Contract, for the Purchase Price, with settlement of the sale and purchase to be effected on the Settlement Date and subject to the other provisions of this Agreement.

2.3 The Put Option is irrevocable until 3 p.m. on the Put Option Expiry Date.

2.4 The Put Option may be exercised from 9.00am on 1 December 2014 until the Put Option Expiry Date by the Owner delivering to JLF two (2) copies of the Contract, duly signed by Owner, to which a PAMD Form 30c is attached as the top page and with the following details completed in the Reference Schedule:

A. the full name and address of the Owner under "Seller";

B. the address, description and other particulars of the Property under "Property";

C. the tenants name, term and options, rent and name and address of the managing agent and other particulars under "Matters Affecting the Property; and

D. the Purchase Price under "Purchase Price"."

[4] The term "Purchase Price" is defined in the Put Option Agreement to mean "the sum of $509,000 – being the sum of $100,000 more than the Owner paid for the Property". For present purposes the important definition is of the term "Contract" as "a contract in the form of contract in Schedule 1". The body of Schedule 1 commences with the "PAMD Form 30c". That is followed by an unexecuted copy of the eighth edition of the REIQ/Queensland Law Society standard form of contract for houses and residential land. The text "Eighth Edition" appears near the top of the first page (which is the first page of the four page Reference Schedule) and at the foot of each of the six pages of contractual terms. At the foot of each of the four pages of the Reference Schedule is printed text, "REIQ Reference Schedule 8th Edition – for JLF Put option". A reference to "Eighth Edition" also appears towards the top of the page of "Special Conditions" on the fourth page of the Reference Schedule. In the Reference Schedule the name, address and contact details of the appellant as the "buyer" are completed, as are some other details, including the place for settlement and the settlement date.

[5] Within the period specified by cl 2.4 of the Put Option Agreement for the exercise of the put option, the respondent by his solicitor delivered copies of a written "Put Option Exercise Notice" dated 11 December 2014 together with two copies of a contract in the tenth edition REIQ/Queensland Law Society standard form contract executed by the respondent as seller. Those documents were delivered under the cover of a letter from the respondent's solicitor to the appellant dated 16 December 2014 which referred to the enclosed "Put Option Exercise Notice" and "Contract For Sale signed by the Seller", and asked the buyer to forward a copy of the contract signed and dated by the buyer to the respondent's solicitor's office.

[6] The primary judge held that the exercise of the put option was not invalidated by the delivery of the tenth edition rather than the eighth edition of the standard form contract. In so holding, the primary judge referred to Gibbs J's statement in *Quadling v Robinson*,[1] that "the exercise of the option, to be valid, must have been absolute and unqualified and must have bound the respondents to perform the very terms set out in the option." The primary judge also referred to the decision in *Phillips Fox (A Firm) v Westgold Resources NL*,[2] that the valid exercise of an option required strict compliance with

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1 (1976) 137 CLR 192, 200-201.

2 [2000] WASCA 85.

the form of the notice required by a clause of an option agreement which was similar to cl 2.4 of the Put Option Agreement. The primary judge considered that the Put Option Agreement did not make delivery of the eighth edition standard form contract a mandatory requirement; rather, it was a "machinery provision" and the respondent's use of the tenth edition instead was appropriate in the circumstances of this case. The primary judge held that strict compliance with the method of exercise of the option stated in cl 2.4 of the Put Option Agreement was not required and it was sufficient for the respondent to express a clear intention to exercise the option.

[7] The appellant challenged those conclusions and the reasons given by the primary judge in support of them. The respondent argued that the primary judge's conclusions were correct for the reasons given by her Honour.

[8] The resolution of the appeal turns upon the proper construction of the Put Option Agreement. An objective approach must be adopted in that exercise; the meaning of that agreement must be determined by what a reasonable business person would have understood it to mean, and that requires consideration of the language of the agreement, the surrounding circumstances known to the parties, and the commercial purpose or objects to be secured by the agreement.[3] The commercial purpose or objects to be secured by the Put Option Agreement are in this case evidenced only by its terms. It was not suggested that any extraneous circumstance influenced the meaning of that agreement. The critical question is what a reasonable business person would have understood its terms to mean. In my respectful opinion, there is no relevant ambiguity about the meaning of cl 2.4. It is the only provision of the Put Option Agreement which describes how the option may be exercised. The word "may" is permissive only in the sense that the respondent was entitled, but not obliged, to exercise the option. It is not an indication that the mode of exercise of the option specified in the following provisions of cl 2.4 was not necessary for the exercise of the option.[4] Thus, the only way in which the put option could be exercised, if the respondent chose to exercise it, was "by the Owner delivering to JLF two (2) copies of the Contract…", and otherwise as prescribed in cl 2.4.

[9] The primary judge noted that cl 2.4 did not itself contain express terms requiring an executed contract in the form of the eighth edition of the standard form contract, but that was conveyed with at least equal clarity by the inclusion in Schedule 1 of a form of contract with several identifications in it that it was the eighth edition of the standard form contract. Nothing further was necessary to make that clear, but there was also the statement on each of the four pages of the Reference Schedule, "for JLF Put option".

[10] The primary judge considered that there was a good argument that, in light of the passage of time between when the original contract for the purchase of the property and the Put Option Agreement were made in 2011 and the purported exercise of the put option in 2014, and the fact that the contract in Schedule 1 was in a standard form and contained no special conditions, the parties' intention was that the edition of the standard form contract in effect at the time of the exercise of the option should be used. An alternative view is that it is commercially unlikely that the parties intended that the form of contract entered into upon exercise of the option would be determined by persons other than themselves. In any event, the Put Option Agreement very clearly required the use of the eighth edition.

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3 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

4 See *Phillips Fox (A Firm) v Westgold Resources NL* [2000] WASCA 85 at [79] (White J), concerning an option provision in a similar form.

[11] Clause 1.2(f) of the Put Option Agreement provided that "a reference to a PAMD Form means that form as approved from time to time in accordance with section 598 of the Property Agents and Motor Dealers Act 2000 and includes other forms which replace renumber or amend it". The *Property Agents and Motor Dealers Act* 2000 (Qld) was repealed in December 2014 and replaced by provisions of the *Property Occupations Act* 2014 (Qld). The primary judge observed that the tenth edition of the standard form contract incorporated the warnings and notices which are contained in the PAMD Form included in Schedule 1 of the Put Option Agreement. The primary judge considered that the incorporation of the warnings and notices in the tenth edition form of contract was required by ss (2) and (3) of s 165 of the *Property Occupations Act*. The primary judge considered that it would be absurd for the respondent to be required to send an obsolete form, potentially exposing himself to a penalty under s 165(5) of the *Property Occupations Act*, and that cl 1.2(f) demonstrated that the parties intended that in exercising the put option, the respondent was required to comply with the legislative arrangements then in force. For those reasons the primary judge concluded that it was intended that the respondent would adopt current forms and requirements, which was an indication that strict compliance with cl 2.4 of the Put Option Agreement was not envisaged.

[12] In my respectful opinion this approach does not accord with the distinction made in cl 2.4 of the Put Option Agreement between "the Contract" and the PAMD Form 30c. The content of the requirement to attach the PAMD Form in light of legislative changes had no bearing upon the requirement for the valid exercise of the put option that the respondent deliver to the appellant two signed copies of a contract in the form of contract in Schedule 1, namely, the eighth edition of the standard form contract. Furthermore, contrary to a submission made for the respondent, the enactment of s 165 of the *Property Occupations Act* did not introduce any confusion about the required content of that contract. That argument relied upon the provisions in ss (2) and (3) of s 165 which required a notice and warning to be written "in the contract". That provision applied, however, only in relation to a proposed "relevant contract". Section 160(1)(b)(iii) excludes from the definition of that term, "a contract … formed because of the exercise of an option granted under an earlier contract, if the parties to the later contract are the same as the parties to the earlier contract". A contract formed upon the exercise of the put option is within the terms of that exclusion, with the result that s 165 was not applicable in relation to it.

[13] The primary judge referred to a passage in *Phillips Fox (A Firm) v Westgold Resources NL* in which White J quoted a statement by the trial judge in that case that the option could be exercised only by the giving of a notice in the form in a schedule and that this intention was "confirmed by the commercial setting in which the put option deed was negotiated" and "[t]he circumstances were such that one would expect a precise definition of the conditions that must be met before the option was exercised…".[5] The primary judge observed that, in this case, the put option was not negotiated in a commercial setting, the evidence of the respondent being that the Put Option Agreement was entered into by the appellant to provide the respondent with an incentive to purchase the residential property.

[14] The passage quoted by White J referred to the commercial background and circumstances only as confirmation of the meaning, in any event, conveyed by the contractual language in that case, that it could be exercised only by the giving of the scheduled form. Furthermore, the Put Option Agreement, together with the contract by which

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5 [2000] WASCA 85 at [79].

the respondent originally purchased the property, was a commercial transaction; this was an investment property occupied by a tenant and the Put Option Agreement supplied the incentive that the respondent could secure a capital gain.

[15] The primary judge referred to "strict compliance" not being required. The appellant does not need to rely upon the adjective "strict". The form of contract delivered by the respondent contained terms which were not in the form of contract cl 2.4 of the Put Option Agreement required to be delivered. As the primary judge noted, the new terms provide for: a suspension for the time for performance of the parties' settlement obligations (and the cessation of time being of the essence of the contract) if a party is unable to perform a settlement obligation solely as a consequence of a natural disaster (with some exceptions) (cl 6.2); different calculations of Land Tax as an adjustment to the balance purchase price (cl 2.6(4)); the disentitlement of the seller to require payment of the balance purchase price other than by bank cheque without the buyer's consent (cl 2.6(14)); a requirement for the seller on request to give the buyer a written statement supported by evidence of various outgoings and rent for the property, and other information required by the buyer for the calculation or apportionment of outgoings or rent (cl 2.6(15)); and, obligations imposed upon the seller after the contract is made to give to the buyer a copy of any notice, proceeding or order affecting the property or requiring work on it, and not without the buyer's prior written consent to give any notice or seek or consent to any order or make any agreement affecting the property that binds the buyer to perform (cl 8.3(2) & 8.3(3)).

[16] The primary judge observed that the first two of those terms affected buyers and sellers equally and that the other clauses imposed more stringent requirements upon a seller (the respondent). In argument, counsel for the respondent expressed the same concept in the submission that the addition of cl 6.2 did not affect one party in a worse way than it affected another party. For present purposes it is sufficient to focus upon the first two new provisions, cls 6.2 and 2.6(4)(b). The relevant comparison is not between the effect of those terms upon the interests of the buyer and the interests of the seller. It is between the eighth and tenth editions of the standard form contract. The addition of the new terms in the tenth edition of the standard form makes it impossible to say that any difference between that edition and the eighth edition is immaterial. There was no evidence that the difference was "commercially insubstantial", so it is also not necessary for the appellant to rely upon the statement quoted with apparent approval by White J in *Phillips Fox (A Firm) v Westgold Resources NL* that "courts cannot forgive a non-compliance with obligations which the parties have agreed must be complied with to make the notice effective however commercially insubstantial those requirements might seem to be".[6]

[17] The primary judge noted that the signed contract delivered with the notice of exercise of option was a later version of the standard form contract and contained all the details required to be contained in the Reference Schedule by cl 2.4. Her Honour concluded that every effort had been made to conform because all of the essential terms were contained in the tenth edition and the only substantial additions were in favour of the respondent. There was no explanation why the respondent did not simply use a copy of the form of contract in Schedule 1 of the Put Option Agreement. I am respectfully unable to find a basis in the evidence for the finding that every effort was made by the respondent to comply with the required mode of exercise of the option. In any event that is not a relevant test, nor, in my respectful opinion, is it relevant to consider whether or not the additions in the tenth edition were "substantial".

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6 [2000] WASCA 85 at [79].

[18] The primary judge found that: in the period from 16 December 2014 to December 2015 the appellant did not give any clear intimation to the respondent that strict compliance was required (as had occurred in *Phillips Fox (A Firm) v Westgold Resources NL*); the delivery to the appellant of the notice and signed contract forms about two weeks before the expiry date for exercise did not evoke a response that the wrong edition of the contract form had been used; an email sent by the appellant to the respondent on 16 September 2015 inferred that "*the*" contact which had been sent would be signed and returned before the settlement date; and correspondence sent by the appellant to the respondent after the purported exercise of the option, which referred to various alternatives to the appellant purchasing the property, indicated that the appellant understood that the respondent had unequivocally exercised the option. The respondent did not advance a case that a contract requiring the appellant to purchase the property came into existence otherwise than by exercise of the put option on 16 December 2014 effected by the delivery of the put option exercise notice and accompanying signed copies of the contract in the tenth edition of the standard form contract. The appellant's case turned upon the question whether the purported exercise of the put option did or did not comply with the contractually agreed requirements for an effective exercise of the put option. The communications between the parties to which the primary judge referred had no relevance to that question.

Disposition and orders

[19] The clear language of cl 2.4 of the Put Option Agreement made the delivery to the appellant of two copies of the eighth edition of the REIQ/Queensland Law Society standard form of contact for houses and residential land, duly signed by the respondent, an essential requirement for the exercise of the put option. The respondent's delivery of signed copies of the tenth edition of that standard form contract did not comply with that essential requirement, with the result that the put option was not exercised.

[20] The appeal should be allowed and the declarations made in the Trial Division should be set aside. The notice of appeal sought an order for a declaration that the respondent had failed properly to exercise the put option. In the course of argument that was re-formulated as a declaration that the respondent had not exercised the put option. No such declaration was sought in the Trial Division. The appellant did not point to any particular matter as a justification for granting it on appeal.

[21] I would make the following orders:

(a) Allow the appeal.

(b) Set aside the declarations and orders made in the Trial Division.

(c) Dismiss the originating application.

(d) Order that the respondent pay the appellant's costs of the appeal and the costs of the application in the Trial Division.

[22] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[23] **PHILIP McMURDO JA:** I agree with Fraser JA.