DISTRICT COURT OF QUEENSLAND

CITATION:	*Brooke v Bauer* [2020] QDC 165
PARTIES:	Peter Brooke (Plaintiff/Respondent) **v** Holger Bauer (Applicant/Defendant)
FILE NO/S:	D361 of 2019
DIVISION:	District Court at Southport
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	17 July 2020
DELIVERED AT:	Southport
HEARING DATE:	19 June 2020
JUDGES:	Kent QC DCJ

ORDER:

1. **That the claim and statement of claim, and the amended claim and statement of claim, be struck out, without leave to re-plead;**

2. **That the caveat lodged by the respondent on Lot 338 on RP 159048, County of Ward, Parish of Gilston, Title Reference 15706040 be removed;**

3. **That the proceeding represented by the remaining orders sought in the application continue as if commenced by claim;**

4. **That the applicant file points of claim thereupon within 7 days of the date of this order;**

5. **That the respondent file and serve points of defence within 28 days of service of the points of claim;**

6. **That the applicant file and serve a reply, if any, within 14 days of service of the points of defence;**

7. **That disclosure and other steps in the proceeding be made in accordance with the procedures and time limits as prescribed by the *Uniform Civil Procedure Rules* 1999 (Qld) for an action commenced by claim;**

8. **Costs reserved.**

CATCHWORDS: CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - FORMATION OF CONTRACTUAL RELATIONS - OFFER - OPTION FOR VALUABLE CONSIDERATION OR UNDER SEAL - EXERCISE OF OPTION - EFFECT OF EXERCISE AND RELATED MATTERS - where the respondent purported to exercise an option for the purchase of property in the applicant's control - where the option did not mention a deposit - where the option was conditional upon the plaintiff securing funds from an unspecified overseas deal - where the defendant's response was vague as to whether it conveyed an intention to create an enforceable contract - where the option was open ended as to time - where the other registered proprietors were not parties to the litigation - where the plaintiff did nothing to exercise the option for some two years after the fact - whether the option to purchase the property was supported by valuable consideration - whether the option is contractually binding.

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - FORMATION OF CONTRACTUAL RELATIONS - MATTERS NOT GIVING RISE TO BINDING CONTRACT - VAGUENESS AND UNCERTAINTY - AGREEMENT SUBJECT TO FURTHER AGREEMENT OR ARRANGEMENT - where the respondent purported to exercise an option for the purchase of property in the applicant's control - where the offer was vague and open ended as to time - where the option was conditional on events largely out of the control of the parties - whether the option constituted a contractual promise.

PROCEDURE - JUDGMENTS AND ORDERS - IN GENERAL - CLASSIFICATION - FINAL AND INTERLOCUTORY - where the applicant applies under r 171 of the *Uniform Civil Procedure Rules 1999* (Qld) for orders striking out the claim and statement of claim without leave to re-plead - where the respondent seeks leave to add

new parties to the originating process so as to plead a meaningful amended case pursuant to r 377 of the *Uniform Civil Procedure Rules 1999* (Qld) - whether the claim discloses a reasonable cause of action - where the application also sought orders for vacant possession, judgment for a sum of money, weekly rental and interest, exemplary damages for false representations and costs - whether the subject of those orders in the application should be treated as if started by claim pursuant to r 14 of the *Uniform Civil Procedure Rules 1999* (Qld) or by counterclaim.

COUNSEL: J Rivett (Solicitor) for the applicant
Respondent self -represented

SOLICITORS: Coast to Coast Legal (applicant)
Respondent self -represented

[1] This is an application, primarily, by the defendant to strike out the claim and statement of claim as not disclosing a reasonable cause of action pursuant to Rule 171 of the *Uniform Civil Procedure Rules ("UCPR")*. The discretion conferred by the rule should only be exercised in clear cases, bearing in mind that the evidence necessarily at this stage is untested.[1]

Background

[2] The action concerns a house situated at 118 Oceanic Drive, Mermaid Waters, Gold Coast. The property is registered in the name of the applicant's mother as tenant in common as to a one half interest, and her late husband's two children (now proposed to be joined as second and third defendants) as tenants in common in the other half interest. They hold their interest pursuant to their late father's will. The situation arose as follows:

- Previously, when the applicant's mother (Helga Schuler) was married to Hellmut Schuler, the property was registered in their names as tenants in common in equal shares;

- When Helmut passed away, his sons Siegfried and Wolfgang were his executors. The will provided that Helga have a life interest. Those parties have been registered proprietors as tenants in common since at least 2001[2];

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1 See for example *Royalene Pty Ltd v Registrar of Titles* [2007] QSC 7059 at [6].

2 See the affidavit of the applicant, court file document no. 4, paragraphs 3-11 and exhibit 4 thereto

- Helga does not live in the property. She is 97 years of age, cared for in a nursing home, and requires the income from the property for her maintenance.[3]

[3] The applicant holds a power of attorney to manage the rental of the property on behalf of his mother who has the right to income from the property pursuant to the life interest. In this context the applicant has managed rental of the property for this purpose for some time.

[4] In April 2016,[4] the applicant rented the property to the respondent for an initial six month period.[5] Afterwards he seems to have remained in occupation as a tenant at will; presently a monthly tenancy at will. The applicant, amongst other things, wishes to bring this tenancy to an end, and a notice has been given to the respondent plaintiff in that regard[6].

[5] The genesis of the present dispute, however, is that on 4 September 2017 the respondent sent an email to the applicant purporting to record an agreement for the grant of an option to buy the property. The email is in brief terms. The text is as follows:

> "Hi Bob, as discussed and agreed I note the terms of the option for me to purchase the property at 118 Oceanic Drive, Mermaid Waters as follows:
>
> 1. Purchase price to be $650,000 being the mid-point between the guesstimate range of 600K and 700K for the value. This is favourable to you as there will be no agent commission.
>
> 2. Option exercise for purchase is dependent on funds from the Chinese deal as discussed, or indeed other funds if possible. I cannot guarantee a timing. In the meantime you agree to keep me on as the tenant.
>
> 3. Once option is exercised, I will be able to proceed to settlement quickly, at least within 30 days.

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3 *Ibid* paragraph 11
4 See the affidavit of the respondent plaintiff, court file document no. 5, paragraph 3
5 Document 5 of the exhibits to Mr Bauer's affidavit
6 *Ibid* document 10, 21/1/2020

4. Once the option is exercised, you will be responsible for issue of contract from registered proprietors as vendors to Peter Brooke or nominee as purchaser.

5. Once option has been exercised, rent on the property will cease forthwith in view of the quick settlement. I will then be in occupation of the property under license and adjustments for rates etc will be calculated from the date that the license commences.

6. If settlement is delayed beyond 30 days because of any default on my part, rent will again commence and back rent to the date of the option will be paid.

7. You grant me the right to lodge a caveat on the title of the property should I feel the need to protect my interests under this arrangement.

I'll keep you updated on the Chinese deal."

[6] This produced, on the present evidence, a brief email response:

"Hi Peter. OK that will fine. Thanks. Bob."

[7] The plaintiff purported to exercise the option on 7 August 2019, and lodged a caveat on 23 September 2019. The present action was subsequently commenced, claiming specific performance of the agreement confirmed on 4th September (a reference to the option) and thus this application was made.

[8] The application is to strike out the entirety of the claim and statement of claim and amended claim and statement of claim on the basis that the proceedings do not reveal a cause of action. The point made by the applicant defendant is that the option is not enforceable, because the promise referred to was not supported by any consideration and thus is not binding in a contractual sense.[7] The proceedings, seeking as they do orders for specific performance of what is said to be an agreement in writing are thus fatally flawed.

[9] The thrust of the application is thus to put an end to the proceedings, or at least the plaintiff's claim. Thus, although not expressly sought in the application, the

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7 *Goldsborough Mort & Co Ltd v Quinn* (1910) 10 CLR 674 at 678.

applicant also submits that the plaintiff should not be given leave to re-plead, as the alleged cause of action is fatally flawed; this would terminate the plaintiff's claim.

[10] In response the plaintiff resists the application and seeks leave to file the amended claim and statement of claim, addressing some of the contested issues.

The Pleadings

[11] The plaintiff filed an amended claim and statement of claim on the 5th June. It recast the original action somewhat, and claimed specific performance of an agreement of the 4th September 2019. However he now relies on another proposed version of an amended claim and statement of claim, adding for the first time the Schuler brothers as second and third defendants. Helga is still not proposed to be a party. It is trite to observe that the plaintiff could not obtain orders for specific performance of an agreement said to compel the transfer of the property to him unless all the registered proprietors were joined. As matters stand they have not been, nor are they proposed to be. Nevertheless the proposed amended pleadings represent, apparently, the plaintiff's best attempt to set out his cause of action.

[12] This present proposed form of the action pleads the correct identity of the registered proprietors. It pleads a number of conversations with the applicant, and that he had the relevant power of attorney. The option is set out as above and it is pleaded that the option was accepted by the defendant. It is pleaded that there was an implied term of the agreement that the contract of sale and purchase would be a standard form REIQ contract or similar which would give effect to the agreement. It is pleaded that there was an implied term of the option that the first defendant would issue the contract of sale to the plaintiff expeditiously. It is also pleaded that there was an implied obligation of each party to co-operate in performance of the agreement.

[13] As regards the Schulers, it is pleaded that the first defendant had agency or ostensible authority to act on their behalf, or that they are estopped from denying this. The relevant factual propositions said to support this conclusion are set out at paragraph 24 of the present version of the statement of claim. They refer to the plaintiff's beliefs and some actions of the applicant, but there is no reference to anything done or said by the second and third defendants.

[14] The defendant/s have not yet pleaded to any of this, choosing to make this application instead.

Submissions and discussion

(a) Lack of consideration

[15] An option to purchase, in the present context, would normally be understood as an agreement to keep open, for a set period, an offer to sell or lease real property. An option can be used, for example, to give the buyer time to resolve questions of financing, title, zoning, and feasibility before committing the buyer to purchase. Options are frequently used in this way. The option must be supported by actual consideration, separate and independent of the purchase price of the property. Mere recital of consideration alone is not sufficient except in a lease-option in which the provisions of the lease are themselves sufficient consideration to support the option.

[16] The applicant defendant submits that, even accepting the plaintiff's case at its highest as to the option, it is not supported by consideration and is thus, in a contractual sense, unenforceable; *Goldsborough Mort & Co v Quinn*.[8] He refers to the passage from the judgment of Griffith C.J.:

> "A mere promise to leave it open for a specified time makes no difference, because there is, as yet, no agreement, and the promise, if made without some distinct consideration, is *nudum pactum*[9] and not binding."[10]

This was, of course, *obiter dicta* in that case; consideration of five shillings had been given for the option, and it was enforceable. Nevertheless, the principle applies, and in the present case, there is not any express (or, the applicant submits, other) consideration, and thus the applicant says the action is not maintainable, and should on the facts be struck out with no leave to re-plead.

[17] In response, as to the issue of lack of consideration, the plaintiff relies on *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* (2009) QCA 60 at [47] *("Moffat")* per Keane JA:

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8 (1910) 10 CLR 674

9 Literally, a "naked promise" or "bare promise"; a promise not legally enforceable for want of consideration

10 At 678

"No challenge was made in this Court to this aspect of the learned trial judge's reasons. For my part, I would observe simply that the exchange of mutual promises fairly afforded sufficient consideration to bind the parties to their bargain if those promises were intended to create an enforceable contract."

[18] The passage from the learned trial judge's reasons referred to was not set out by the respondent in argument. It is at paragraph [46] of the judgment as follows:

"**Consideration for the agreement**

[46] The learned trial judge rejected the first of Hebron Park's arguments. His Honour said:

> "Consideration was provided by the parties' mutual conferral of rights and assumption of obligations. The plaintiff's 'call' option was consideration for the defendant's 'put' option. The consideration for the right conferred on the plaintiff to buy the land was the right conferred on the defendant to sell it.
>
> There is an alternative approach. The consideration for the grant of an option need be not more than a peppercorn. One commonly sees options of this type granted in consideration of the payment of one dollar. When the parties agreed, as in my opinion these parties did, that they should execute a put and call option agreement their presumed intention must have been that the agreement was to be binding, which would require valuable consideration. It would be an appropriate case in which the law would imply a term that each party would give sufficient consideration, eg one dollar to the other to make the contract binding. The implication of such a term is necessary to give business efficacy to the agreement, and is so obvious as to go without saying. As well, such a term is reasonable, capable of clear expression, and does not contradict any express term of the contract. The five conditions for the implication of terms as described in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1981 – 1982) 149 CLR 337 at 347, are satisfied."

[19] Thus the plaintiff relies on these observations to meet the argument of unenforceability due to lack of consideration. Thus the real question on this point in the present case is whether there was, as in *Moffat*, a mutual conferral of rights and assumption of obligations such as to amount to consideration and thus enforceability.

[20] There are, however, differences from the present case. In *Moffat* the arrangement was much more formal; the letter was directed to the owner's agent and was described as an unconditional offer and expressly said "Contract will be **unconditional** in the form of a Put & Call[11]". It provided for the purchase price and, on acceptance, a substantial **non-refundable** deposit. It was accepted in writing by the offeree the next day.

[21] In the present case, the email from the plaintiff firstly recorded an agreement which was completely open-ended as to time. This in itself creates problems. It can be implied that it was exercisable within a reasonable time; see for example *Gold Coast Oil Co Pty Ltd v Lee Properties Pty Ltd.*[12] Acknowledging that this may be so, it is difficult to conclude that a date almost two years later, and eighteen months after the only formal lease had expired, was a "reasonable time" for the purposes of such an implied term. It is certainly difficult to uphold an implication of a term that the option would remain exercisable indefinitely, and in this case two years later. The more logical conclusion is that any option which did exist had either lapsed or been repudiated by the passage of time, or was in the first place so vague as to not be intended to be binding in a contractual sense.

[22] Secondly, it does not mention a deposit, much less a non-refundable one, and far from being unconditional, it is expressed to be conditional on the success of an unspecified *"Chinese deal as discussed, or indeed other funds if possible. I cannot guarantee a timing"*. While an option may always in a sense be conditional, in that it is not intended to give effect to a binding contract of sale until it is exercised by the grantee, in the present case the arrangement was conditional on an unspecified "Chinese deal" and presumably the success thereof. Further any contract thus arising, although described as being for 30 days, also contemplated being extended indefinitely, with the grantee then resuming to pay rent. These arrangements are very tenuous, such as to give rise to doubt as to what consideration was flowing from the grantee for this nebulous arrangement.

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11 Generally understood as an agreement between a vendor of a property (grantor) and the other party (grantee) under which the grantor gives the grantee a *call option* to buy the property and the grantee gives the grantor a *put option* to sell the property to the grantee; this terminology is suggestive of a mutuality of obligations

12 [1985] 1 Qd. R. 416 at 421

[23] Further, the alleged affirmative response (*"Ok that will be fine"*) was so vague as to raise doubt as to whether it established and conveyed an intention to create an enforceable contract. Again, on the facts as pleaded, the plaintiff took no step to exercise it until the notice sent the 7th August 2019, about two years later. There is no suggestion of correspondence or other communication or acts in the interim suggestive of continuation of the option in force.

[24] No doubt, as set out by Justice Keane, there are cases where an option is rendered enforceable by consideration consisting of exchange of mutual promises if the promises were intended to create an enforceable contract; or indeed, a peppercorn may be sufficient. On the facts as pleaded, however, this is not such a case. The "offer" was so vague, open ended and conditional – including on events largely in the apparent control of third parties, and thus lacking the status of a contractual promise[13] - as to lack any value as consideration, implied or otherwise; it falls into the category described by Griffith C.J. in *Goldsbrough Mort*. Thus my conclusion, for the reasons outlined above, is that the alleged option is not enforceable due to lack of any identifiable consideration. It is not a case where a term as to consideration should be implied.[14]

[25] Thus the challenge to the pleadings on this basis is successful and they should be struck out as not disclosing a cause of action. Given that the relevant facts are not contentious and the problems fundamental, there should not be leave to re-plead.

(b) Missing Parties

[26] The plaintiff's case also has other basic problems. First, an order for specific performance of this kind of agreement, involving real property, is only available where the registered proprietors are parties to the litigation and thus susceptible to court orders. The second and third defendants are not yet parties, and there is apparently no plan to include Mrs Schuler. This alone is fatal, on the presently proposed pleadings. Leave would be necessary to add the new parties to the originating process; *UCPR* 377. Thus leave is necessary for the plaintiff to plead a

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13 See *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 565

14 See generally the requirements for implication of a term in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337

meaningful amended case. There are good reasons for refusing such leave, where the cause of action is fatally flawed as set out above.

[27] Next, the second and third defendants are sought – on the proposed amended pleadings - to be included on the basis of their being estopped from denying the applicant was their agent, alternatively he had ostensible authority. The relevant pleadings refer to the following circumstances:

(a) They are the executors of their father's will;

(b) Pursuant to the will, Helga has a life interest, and they have power to sell if Helga requests this;

(c) The applicant, as Helga's attorney, is entitled to ask them to sell and invest the proceeds for Helga's benefit, which they in turn are empowered to agree to;

[28] It is then pleaded that firstly the plaintiff had a reasonable belief that the applicant had unfettered control to deal with the premises because of (presumably the applicant's) intentional representations and his conduct; secondly, the applicant failed to correct the above impression.

[29] It is next pleaded that the plaintiff relied on the belief that an agency relationship existed no matter who the registered proprietors might be; and thereby he has suffered loss not liable to be compensated by an award of damages. Thus he claims specific performance alternatively damages.

[30] It is not pleaded that the plaintiff knew of the will, its terms or the existence of the Schuler brothers at the time of the option. It is pleaded that the applicant earlier represented that he was the only person who had "control" of the property and no-one else needed to be consulted in relation to "any of the business of the property". It is not pleaded that the applicant represented that his mother was the sole owner, or that he himself was the owner or an owner.

[31] While it is true that ostensible authority can be implied from a course of dealing, with a principal equipping an agent with a particular title, status or facilities, and

that the representation may be in a passive way,[15] none of these features arise here. On the pleadings and the available evidence the applicant was not, and did not purport to be, the Schuler brothers' agent; they had no say in his management of the property as his mother was still alive and he was operating under the will and his power of attorney. The applicant did not mention them, nor should he; he did, properly, refer to his mother. The course of dealing did not give rise to the required implication.

[32] The respondent, who is self-represented, is a former solicitor. There is no suggestion he ever conducted a search of the title to ascertain the registered proprietors, either when discussing the option or at any stage prior to his alleged exercise of it two years later. Had he done so, an immediate question would have been raised as to the applicant's authority to bind the Schuler brothers.

[33] If Helga had been the sole owner, the option could have had a binding effect, subject to the above problems (which I have separately concluded to be fatal). However in the circumstances, where the Schuler brothers were not part of any of the communications about the option, and I conclude the pleading of ostensible authority or agency is without merit, again the pleading, even in its proposed amended form, would not disclose a cause of action and on this basis also would be struck out.

[34] Thus the application to strike out the pleadings should be allowed, without leave to re-plead; no proper amendment could cure the basic problems.

Further Orders

[35] The applicant seeks further orders, which somewhat complicate the matter. They are, as presently identified, that the caveat lodged by the respondent on the land be removed; that this application be deemed to be a claim – presumably invoking the jurisdiction in *UCPR* 14; that thereafter the applicant as plaintiff file and serve an amended claim and statement of claim and that there be consequent procedural directions. This is because the application itself sought a number of orders by way of further relief including vacant possession of the property; judgement for a sum of

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15 *Owens v Harris Bros* (1932) 34 WALR110 at 117

money plus further weekly rental and interest; exemplary damages for an unspecified cause of action referring to false representations; and costs.

[36] What was canvassed at the hearing was that these matters would normally be agitated by way of a counterclaim, but in this case there is not yet any defence, and on the application there would never be, because the application's effect was to dispose of the cause of action altogether. Thus there would be no claim against which to counterclaim, and no proceeding in which the further orders could be pursued. The present intention is thus to pursue them in a reconstituted action to be treated as having been commenced by the application.

[37] While this is somewhat unorthodox – and the alternative would simply be to require the applicant to commence his own separate action - in my view it is a proper exercise of the discretion conferred by *UCPR* 14, particularly in the context of the entreaties as to efficiency, practicality and minimisation of expense in *UCPR* 5. Some of the orders are appropriate to be made immediately; for example, there is no longer a basis for the caveat.

[38] Thus the orders will be as follows:

1. That the claim and statement of claim and amended claim and statement of claim be struck out, without leave to re-plead;

2. That the caveat lodged by the respondent on Lot 338 on RP 159048, County of Ward, Parish of Gilston, Title Reference 15706040 be removed;

3. That the proceeding represented by the remaining orders sought in the application continue as if commenced by claim;

4. That the applicant file points of claim thereupon within 7 days of the date of this order;

5. That the respondent file and serve points of defence within 28 days of service of the points of claim;

6. That the applicant file and serve a reply, if any, within 14 days of service of the points of defence;

7. That disclosure and other steps in the proceeding be made in accordance with the procedures and time limits as prescribed by the *Uniform Civil Procedure Rules* 1999 (Qld) for an action commenced by claim;

8. Costs reserved.