

SUPREME COURT OF QUEENSLAND

CITATION: *Felix Hill Pty Ltd v Shirirone Pty Ltd* [2002] QSC 387

PARTIES: **FELIX HILL PTY LIMITED** as trustee of the **Felix Hill Trust**
(plaintiff)
v
SHIRIRONE PTY LIMITED as trustee for the **Robinson Family Trust and for the Shirirone Executive Superannuation Trust**
(first defendant)
STUART PHILLIP ROBINSON
(second defendant)
GLENICE ELLEN ROBINSON
(third defendant)

FILE NO/S: SC No 7731 of 2002

DIVISION: Trial Division

PROCEEDING: Application for summary judgment

DELIVERED ON: 26 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 22 November 2002

JUDGE: de Jersey CJ

ORDER:

- 1. The application for summary judgment is dismissed.**
- 2. Adjourn the aspect of the application which seeks alternatively that the matter be listed on the Commercial List, to a date to be fixed**
- 3. Costs reserved.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – MATTERS NOT GIVING RISE TO BINDING CONTRACT – STATEMENTS OF INTENTION, NEGOTIATIONS AND INVITATIONS TO TREAT – where plaintiff seeks summary judgment application pursuant to rule 292 Uniform Civil Procedure Rules – where negotiations for purchase of substantial commercial property – where no formal contract signed – whether parties intended to be bound absent such contract

COUNSEL: J Sweeney for the plaintiff
E Lennon QC for the respondent

SOLICITORS: Hickey Lawyers for the plaintiff
Gardiners Lawyers for the respondent

- [1] **de JERSEY CJ:** The plaintiff applies for summary judgment in a proceeding for specific performance of a contract to purchase a property at Maroochydore called Collins Place. There is no signed contract in the usual sense. The plaintiff relies on documentation exchanged between the parties, comprising annexures A to E to the statement of claim, as evidencing a binding contract. The issue on this application under rule 292 of the Uniform Civil Procedure Rules is whether that documentation sufficiently clearly evidences a contract to warrant a grant of summary judgment.
- [2] Annexure A, the plaintiff's agent's letter of 17 April 2002, was the initial offer to purchase. It provides that "the purchaser would require disclosure of current tenancy details and building outgoings and any current service and maintenance contracts for the purchaser to satisfy a short 30 day due diligence period which would form and run in sequence as part of the 90 day conditional period". It also required the preparation of "a draft Contract of Sale for presentation to the purchaser as soon as possible". The response, annexure B, amounted to a counter offer. It referred to the signing of a contract, specifying that the deposit be paid "on the signing of the contract", and continuing: "The contract must be executed prior to the elapse of seven days after notification by our solicitors that the contracts are ready for execution". Settlement was proposed for "90 days from the date of contract signing". Annexure C was the plaintiff's agent's response, indicating acceptance "on the basis that the exclusive due diligence period be 60 days from date of contract". Annexure D, the defendant's counter proposal which was accepted, referred to "agreement to a 30 day due diligence period", and required payment of a non-refundable \$10,000 "acceptance fee". It continued: "This fee shall entitle the prospective purchaser to the exclusive purchase of the property on these conditions up to and prior to the signing of the contract".
- [3] The preparation and signing of a formal contract is seen to be a consistent theme. It might be considered unsurprising that the parties would have negotiated in the expectation that a comprehensive written contract would be prepared, bearing in mind the amount of the ultimately agreed price (\$3.4 million) and the nature of the property, a commercial development with current tenants and current service and maintenance contracts, raising also the question of what "due diligence" was in mind. There is an issue whether the extent of the "due diligence" reservation is sufficiently clearly established, as a matter of invariable custom, for one to be able to say with confidence that a "due diligence" reservation, without more elaboration, left any contract sufficiently certain.
- [4] The communications between the parties annexed to the statement of claim do not refer to the possible incidence of the goods and services tax. I was informed that if the property were sold as a going concern, GST would not be payable. Otherwise, the vendor would be liable, on this consideration, for \$340,000. Business people involved in a large commercial transaction like this would be careful to deal with

such an issue. It may be agreed as unlikely they would have intended to be bound contractually in circumstances where that issue had not clearly been disposed of. That aspect also prevents my reaching the requisite satisfaction as to the plaintiff's entitlement, such as would warrant my entering judgment summarily.

- [5] I have carefully considered the documents and the submissions. Especially because of the parties' consistent reference to the preparation of a contract, the lack of definition of what should be involved in the process of "due diligence" in the context of this particular proposal, and their apparent failure to deal precisely with the possible incidence of GST, I am not satisfied, with the clarity necessary to warrant a grant of summary judgment, that they plainly meant at the conclusion of this exchange to be immediately contractually bound.
- [6] The application for summary judgment must therefore be dismissed. The plaintiffs seek alternatively that the matter be listed on the Commercial List. While I would be amenable to that course, it is a matter which should be raised with a Commercial List Judge. I will therefore adjourn that aspect of the application to a date to be fixed. Subject to any further argument, I would order that costs be reserved.