SUPREME COURT OF QUEENSLAND

CITATION:	*Tomlinson v Fugro Holdings (Aust) Pty Ltd* [2003] QSC 325
PARTIES:	**PETER JOHN TOMLINSON and ROBYN WELLESLEY TOMLINSON** **(applicants)** **v** **FUGRO HOLDINGS (AUSTRALIA) PTY LTD** **(ACN 003 010 099)** **(respondent)**
FILE NO:	BS7424 of 2003
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	26 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2003
JUDGE:	Mullins J
ORDER:	**1. It is declared that clause 11.2 of the share sale agreement between the applicants and the respondent made on 21 September 2001 under which the sum of $1.00 was payable for the respondent to obtain the grant of an option from the applicants to acquire the premises situated at 11 Hitech Court, Eight Mile Plains in the State of Queensland ("the premises") on a date no earlier than 1 July 2002 but any time before 30 June 2003 was not satisfied by the payment of $1.00 by the respondent to the applicants on 30 June 2003.** **2. It is declared that the applicants are not obliged to grant the respondent an option to acquire the premises.**
CATCHWORDS:	CONTRACT - construction and interpretation – where clause of agreement conferred a right to elect by payment of $1.00 to acquire the grant of an option - where clause specified payment to be made before a certain date - where payment was made on that date - whether payment on that date was sufficient to oblige the grant of the option- whether 'before' in the context should be read as 'on or before'- no inconsistency in the operation of the contract in giving the word 'before' in the clause its ordinary meaning - nothing ambiguous about the word 'before' – the object of the clause is achieved by giving the word 'before' its natural meaning

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579
Thornton's Executrix v Angus & Sons' Trustee 1934 SC 279

COUNSEL: BD O'Donnell QC for the applicants
AM Daubney SC for the respondent

SOLICITORS: McCullough Robertson for the applicants
Blake Dawson Waldron for the respondent

[1] **MULLINS J:** The parties seek the determination of the construction of cl 11.2 of the share sale agreement ("the agreement") made between the parties on 21 September 2001.

[2] The agreement was entered into by the parties as a result of and in substitution for heads of agreement made between the same parties on 30 July 2001. The intention of the parties by entering into the agreement was that the heads of agreement were at an end.

[3] The agreement provides for the sale by the applicants of their shares in Airesearch Mapping Pty Ltd ("Airesearch") to the respondent as the purchaser. The sale pursuant to the agreement was settled on 21 September 2001.

The issue

[4] At the time the agreement was made Airesearch occupied premises at 11 Hitech Court, Eight Mile Plains ("the premises") which were owned by the applicants.

[5] Clause 11 of the agreement provides:

"**11. PREMISES**

11.1 The Vendors will procure that the Company retains the right to lease the Premises on the terms advised to the Purchaser prior to the date of this Agreement.

11.2 The Vendors must on the Purchaser paying the sum of $1.00 to the Vendors, on a date no earlier than 1 July 2002 but any time before 30 June 2003, grant to the Purchaser an option to acquire the Premises, exercisable within 60 days of the date of such grant for:

(a) an exercise price to be agreed between the Purchaser and the Vendors; or

(b) failing an agreement referred to in clause 11.2(a), an exercise price based on an independent valuation of the Premises undertaken by Knight Frank, which valuation will be conducted at the joint expense of the parties.

> If Knight Frank are required to value the Premises they must do so on the basis of the joint instruction from the Purchaser and the Vendors and the valuation being of the current market value for the Premises having regard to the terms of the lease in place at the time of the valuation.
>
> 11.3 The Vendors covenant with the Purchaser that they will not sell or grant an option to sell the Premises to any third party:
>
> (a) on or before 30 June 2003, in the event the Purchaser does not elect to have the option referred to in clause 11.2 granted to it; or
>
> (b) until after the expiry of the option period referred to in clause 11.2(a), in the event the option referred to in clause 11.2 is granted to the Purchaser."

[6] Clause 22.1 of the agreement provides that time shall be of the essence of the agreement in all respects.

[7] It is common ground that on 30 June 2003 Mr John Lazarus on behalf of the respondent delivered a letter to the male applicant requesting the grant from the applicants of an option in favour of the respondent to acquire the premises on the terms set out in cl 11.2 of the agreement and handing over $1.00.

[8] By letter dated 7 July 2003 the solicitors for the applicants advised the respondent that as the notice and payment of $1.00 were made on, but not before, 30 June 2003, the respondent's right to request an option had lapsed. The respondent contends that the exercise of the right to take the option was effective.

[9] The question of construction that has arisen for determination is whether under the terms of cl 11.2 of the agreement the payment of $1.00 on 30 June 2003 by the respondent was sufficient to oblige the applicants to grant the option.

Applicants' submissions

[10] The applicants rely on the express terms of cl 11.2 which required the payment to be made "on a date no earlier than 1 July 2002 but any time before 30 June 2003". It is submitted that the word "before" in that context would ordinarily mean "up to but not including". Mr O'Donnell of Queen's Counsel referred to the dictionary meaning attributed to the word "before" in the *Macquarie Dictionary* (2nd ed) at p 157 where relevant meanings for the word "before" were given as "in time preceding; previously" and "earlier or sooner: *begin at noon, not before*" and "previously to; earlier than: *before the war*". Similar meanings were given in other dictionaries. The ordinary meaning to be given to the word "before" was not substantially disputed by the respondent. (Although the respondent did seek to rely on the construction of the word "before" in a particular statutory context as meaning "not after" in *Thornton's Executrix v Angus & Sons' Trustee* 1934 SC 279, that decision depended on the purpose of the statute and is not of general application as to the meaning of the word "before".)

[11] The applicants submitted that the expression "any time before 30 June 2003" is unambiguous and there was no room for choosing between different possible

interpretations of the clause. It was therefore submitted that, as time was of the essence of the agreement, the payment of $1.00 on 30 June 2003 and not before 30 June 2003 was too late.

Respondent's submissions

[12] It was submitted by Mr Daubney of Senior Counsel that, as a commercial contract, the agreement should be given a business like interpretation and the proper construction of cl 11.2 should take account of the terms of cl 11.3. The respondent relied on the following statement of Gleeson CJ in *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, 589:

> "A policy of insurance, even one required by statute, is a commercial contract and should be given a businesslike interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure". (*Footnotes omitted*)

[13] It is apparent that cl 11.3 is ancillary to cl 11.2. Clause 11.2 conferred on the respondent the right to elect by payment of the sum of $1.00 to acquire from the applicants the grant of the option to acquire the premises. A time period for exercising that election is expressly provided for in cl 11.2. The purpose of cl 11.3 is to protect the right of election given to the respondent under cl 11.2 by restraining the applicants from selling or granting an option to sell the premises to any third party during the period which can be related to the period for the exercise of the right conferred by cl 11.2.

[14] The respondent relies on the fact that cl 11.3 proscribes the applicants from selling or granting an option to sell the premises to any third party "on or before 30 June 2003". It is therefore submitted that if the last day on which the respondent could have exercised its rights under cl 11.2 were 29 June 2003 (as contended for by the applicants), there was no point in extending the proscription under cl 11.3 to and including 30 June 2003. It was therefore put that reading cl 11 as a whole, the only sensible interpretation which should be given to cl 11.2 and cl 11.3 is that they contemplate corresponding time frames. Support is also sought from the fact that 30 June is the last day in a financial year and, in a general commercial context, it is proper to infer that the parties intended the reference to 30 June in cl 11.2 to signify the last day of that financial year as being the last date upon which the respondent could exercise its right under cl 11.2.

[15] Reliance was placed by the respondent on the statement of Gibbs J (as he then was) in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109-110 and, particularly the following passage:

> "Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in *Hillas & Co Ltd v Arcos Ltd*, that the Court should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects", should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. *Upper*

Hunter County District Council v Australian Chilling and Freezing Co Ltd"). (*Footnotes omitted*)

[16] The respondent therefore submitted that the reference in cl 11.2 to "any time before 30 June 2003" means "any time before the expiration of 30 June 2003" or "any time on or before 30 June 2003".

Applicants' submissions in reply

[17] On the issue of the use to be made of cl 11.3 in construing cl 11.2, the applicants relied on the fact that cl 11.3 used the expression "on or before" rather than merely the word "before" that was used in cl 11.2. It was also argued that cl 11.2 imposes the primary obligation on the applicants, namely the grant of the option, and that cl 11.3 deals with the consequential matter, namely imposing a restraint on the applicants from selling the premises whilst the option remains available to the respondent. It is therefore submitted it would be a circular approach to say that because the restraint on the applicants from selling is one day longer than the period during which the election may be made to require the grant of the option, the court should construe the period under cl 11.2 in such a way as to extend it by one day, as that must have been the parties' intention.

Decision

[18] Apart from the clause specifying that time is of the essence of the agreement, no assistance in construing cl 11 of the agreement is obtained from other provisions of the agreement. If cl 11.2 and cl 11.3 are given meaning according to their plain terms, the period in cl 11.2 for the respondent to elect to obtain the grant of the option is relevantly one day shorter than the restraint against the applicants otherwise selling or granting an option to sell the premises to any third party. That is not an absurd result. It does not make the agreement unworkable. It simply means that the protection given by the restraint lasts one day longer than the period during which the respondent was required to make the election provided for in cl 11.2. This is not a situation where the ordinary meaning of the word "before" must be departed from, in order to avoid an inconsistency, as there is no relevant inconsistency in the operation of each of the clauses.

[19] Amongst the objects cl 11.2 was intended to secure was to specify the period during which the respondent had the right to elect to acquire the subject option. The parties used plain language to specify that period. There is nothing ambiguous about the word "before". This object which the clause is intended to secure is achieved by giving the word "before" its natural meaning. As plain language has been used, the plain meaning should be given to it. Parties to a business contract are not assisted by a court imposed construction which adds words which the parties did not put in the contract and which are not required to give effect to the bargain agreed upon by the parties.

[20] As time was of the essence, the applicants are therefore entitled to declarations which support the construction contended for by them.

Order

[21] The orders which will be made are:

1. It is declared that clause 11.2 of the share sale agreement between the applicants and the respondent made on 21 September 2001 under which the sum of $1.00 was payable for the respondent to obtain the grant of an option from the applicants to acquire the premises situated at 11 Hitech Court, Eight Mile Plains in the State of Queensland ("the premises") on a date no earlier than 1 July 2002 but any time before 30 June 2003 was not satisfied by the payment of $1.00 by the respondent to the applicants on 30 June 2003.
2. It is declared that the applicants are not obliged to grant the respondent an option to acquire the premises.

[22] I will hear submissions on costs.