

SUPREME COURT OF QUEENSLAND

File No 6193 of 2004

BETWEEN:

Rodney Sedden Franks as Trustee for R & M Superannuation

Applicant

AND:

Norfolk Estates Pty Ltd ACN 010 355 138

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION: *Franks v Norfolk Estates Pty Ltd* [2004] QSC 301

PARTIES: **Rodney Sedden Franks as Trustee for R & M
Superannuation**

Applicant

v

Norfolk Estates Pty Ltd ACN 010 355 138

Respondent

FILE NO/S: 6193 of 2004

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court

DELIVERED ON: 10 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 26 August 2004

JUDGE: Moynihan J

ORDER: **The applicant is entitled to a declaration that the
contracts remain in force and to specific performance.**

CATCHWORDS: DEEDS – FORM AND EXECUTION – action for specific
performance of contract – action for specific performance of
deed.

Stamp Duties Act 2001 s 487

Burnitt & Anor v Pacific Paradise Resort Pty Ltd [2004]
QDC 218

Caxton Street Agencies Pty Ltd v Koskidas [2002] QSC 210

Dent v Moore 91919) of 24 CLR 316

Hoggett v O'Rourke [2000] QSC 387

Shepherd v Felt Textiles of Australia Ltd (1931) 45 CLR 359

COUNSEL: Applicant: P W Hackett for the Applicant

Respondent: M Horvath for the Respondent

SOLICITORS: David Cowell & Company for the Applicant

Quinn & Scattini for the Respondent

- [1] The applicant, as grantee, and the respondent, as grantor, are parties to “Put and Call Option” deeds (the deeds) granting the applicant opportunities to purchase lots 945 and 924 in a development known as Norfolk Lakes.
- [2] The applicant seeks declarations that the respondent’s purported termination of the contracts of sale consequent on the exercise of the options was unlawful and seeks specific performance of the contracts. Alternatively, the applicant seeks specific performance of the option deed.
- [3] The deeds, they are in identical terms so far as this judgment is concerned, have assigned a deed guarantee and indemnity of the respondent by the applicant. They also have annexed a standard form REIQ contract for houses and land with special conditions annexed to it. The deeds also have annexed community development covenants and a schedule of requirements for dwellings.
- [4] Clause 2 of the deeds provide that the option could be exercised at any time before 5.00 p.m. on the date specified in the schedule to the deeds as the date for the exercise of the option by delivery of a written notice. The schedule provided that the date for the exercise was “3 months from registration of titles”.
- [5] The deeds contemplated that the applicant would build “spec” homes on the lots and that during the “term of” the deed the applicant with or without a house on it to third parties, see e.g. cl 5 and 7 of the deed.
- [6] Clause 4 of the deeds provided:
 - “4.1 On delivery of the Notice of Exercise of Option pursuant to clause 3 the parties hereto become immediately bound as Vendor and as Purchaser respectively under a Contract for Sale in accordance with the terms of the Contract annexed and marked “A”;

4.2 If either of the parties requires the execution of a formal Contract, that party shall prepare and execute a form of Contract in duplicate and forward it for execution to the other party. The parties (on behalf of themselves and their legal personal representatives and assigns) covenant to execute a formal Contract submitted and to return it to the other party promptly PROVIDED ALWAYS that the execution of a formal Contract shall not affect the substances of the parties' respective obligations under the Contract created pursuant to Clause 5 hereto and the parties agree that the obligations hereby created shall not extinguish upon exercise of the Option hereby granted but shall continue until completion of the contract."

[7] Condition 11 of the contract of sale annexed to the deeds is a special condition in these terms:

"11 CONFIRMATION BY SELLER

- (a) This sale is subject to confirmation by the Seller.
- (b) It shall be sufficient confirmation of the Seller's acceptance of the Buyer's offer that the Seller executes this contract without notice of any kind to the Buyer.
- (c) The provisions of this clause shall apply, any statute, rule of law or equity to the contrary notwithstanding.

[8] Clause 5.1 of the deed granted the applicant's rights pending the exercise of the option in respect of approvals and site access to construct a dwelling and provided for the respondent to give 30 days' notice to remedy any alleged breach by the applicant of its obligations in respect of the arrangement. In the event of a notice being given, none was, the applicant was permitted to exercise the option and complete within 30 days without remedying the default.

[9] Clauses 5.2(H) and 6 provided:

"(H) This Put and Call Option is entered into by and becomes binding upon the parties named in the contract upon one party signing the contract that has been signed by the other (or a photocopy of facsimile copy of such Contract) and transmitting a copy of it to the other party for the other party's agent or solicitor."

6. Put Option

6.1 In consideration of the Grantor entering into this Deed, the Grantee HEREBY GRANTS to the Grantor an Option to require the Grantee to purchase any one or more of the lots forming the Property at the price specified in the Schedule as "Contact Price" (the "Put Option").

6.2 This Put Option may be exercised at any time during the Timetable for Exercise of Put Option contained in the Schedule by written notice form the Grantor to the Grantee.

6.3 The provisions of Clause 4 and 5 apply in the event of exercise of the Put Option.”

[10] The respondent has not purported to exercise its option.

[11] Clause 7 of the deed contemplated that during the term of the deed the applicant would market each of the lots with or without the house to third parties and that all sales to third parties would proceed on the current form of contract, annexure A to the deed, which contained special conditions of sale and building contracts.

[12] The respondent was obliged to enter into third party contracts “at the request of and with the consent of” the applicant subject to conditions which are of no present concern; cl 7.3.

The contract, annexure A, to the option is in standard REIQ form with annexures. Special condition 11 provides:

“Confirmation by seller

(a) This sale is subject to confirmation by the Seller.

(b) It shall be sufficient confirmation of the Seller’s acceptance of the Buyer’s offer that the Seller executes this contract without notice of any kind to the Buyer;

(c) The provisions of this clause shall apply, in any statute, rule of law or equity to the contrary notwithstanding.”

[13] The exercise date for the options was 15 June 2004.

[14] After an exchange of correspondence by which the applicant sought relaxation of certain covenant provisions unsuccessfully on 15 June 2004 the applicant exercised the option. The respondent’s solicitors responded by letter of 17 June 2004 referring to clause 5.2 of the options and special condition 11 of the contract of sale and advised that the respondent was not confirming the sale.

[15] The respondent no longer relies on clause 5.2, a requirement about the submission of building plans to the respondent for approval as justifying its refusal to perform the contract but relies on special condition 11 as justifying its position.

[16] The applicants solicitors sent transfer documents for the lots to the respondent’s solicitors but they have not been returned and the respondent maintains that it “does not confirm the contracts”.

- [17] The respondent takes the point that the options had not been stamped and so could not be relied on as a basis for an action as a consequence of s487 of the *Stamp Duties Act 2001*.
- [18] By the time the application came on for hearing the documents had been assessed, duty paid and the deeds stamped.
- [19] Section 487 provides:
- “1. Unless an instrument is properly stamped, it
 - (a) is not available for use in law or equity or for any purpose; and
 - (b) must not be received in evidence in a legal proceeding, other than a criminal proceeding.
- [20] In my view, the duty having been paid, any obstacle to the validity of the enforcement of the deed is overcome from the time when the document would have become valid but for the prohibition; *Shepherd v Felt Textiles of Australia Ltd* (1931) 45 CLR 359.
- [21] The respondent relied on *Hoggett v O’Rourke* [2000] QSC 387 and *Caxton Street Agencies Pty Ltd v Koskidas* [2002] QSC 210. In *Hoggett v O’Rourke* a pleading of an unstamped agreement was struck out notwithstanding its being admitted by the defendants. *Caxton Street Agencies* was a summary judgment application by which time the offending document had been stamped so that the issue of summary judgment did not turn on a failure to stamp.
- [22] Neither of those cases afford the respondent any comfort. In *Burnitt & Anor v Pacific Paradise Resort Pty Ltd* [2004] QDC 218 after a close examination of the authorities McGill DCJ refused to strike out a statement of claim pleading an unstamped contract civil payment of the duty, as had been done in that case, removed any impediment imposed by the section.
- [23] Section 487 is not concerned with the validity of the deed or contract but its use in proceedings. As McGill and the cases cited by him demonstrate that impediment is removed by payment of the duty. In particular *Dent v Moore* (1919) of 26 CLR 316 “even Isaacs J” did not regard lack of stamping as a strike out point because in the event of a new trial it could be cured by stamping.
- [24] I turn to consider whether the respondent’s non performance is justified by special condition 11 of the contract of sale annexed to the deeds.
- [25] Clause 4.1 of the deeds expressed that on the options being exercised the parties are “immediately bound” under a contract of sale “in accordance with” the annexed form.
- [26] Clause 4.2 contemplates that that contract may not be executed by providing further execution in the circumstances canvassed in the clause.

- [27] Clause 7 allows the applicant to sell to the third parties and obliges the respondent to enter into third party contracts.
- [28] In the circumstances of this case the applicants having exercised its options it is difficult to see what is left for the respondent to confirm. It was bound by the deed “as vendor” under the annexed contract.
- [29] If the respondent could avoid the consequence of the exercise of the option given by clause 7 of the deed by declining confirmation under special condition 11 the grant of the option would be nugatory.
- [30] It was submitted for the respondent that although the respondent is not relying on clause 5.2 of the options (about plans having to be submitted to the respondent), the Court may consider it relevant to the exercise of the respondent’s rights under special condition 11. The applicant delivered some plans but they were late and they were not in the appropriate form. The applicant sought a relaxation from the respondent which was declined.
- [31] I have difficulty in understanding how this assists the respondent. The respondent does not now rely on any such breach to justify terminating in circumstances where it did not comply with the requirements of clause 5.1 of the deed as to notice of default and the purchase could be completed in 30 days in the circumstances contemplated by clause 5(1)(D)(1).
- [32] The considerations being those I have dealt with in special condition 11 of the contract of sale annexed to the deeds does not justify the respondent’s refusal to complete the contracts constituted by clause 4 of the deed and the applicant is entitled to have them performed.
- [33] The applicant is entitled to a declaration that the contracts remain in force and to specific performance. I will hear submissions as the precise form of the orders and as to costs.