# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Stening & Anor v Healey & Ors* [2004] QSC 375 |
| PARTIES: | **STEPHEN JAMES STENING and DOUGLAS DESHON BATES**<br>(applicants)<br>**v**<br>**ALASTAIR JAMES HEALEY and CHRISTINA HEALEY (as trustees of the Healey Family Trust)**<br>(respondents) |
| FILE NO/S: | SC No 8819 of 2004 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 1 November 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 27 October 2004 |
| JUDGE: | White J |
| ORDER: | **1. Dismiss the application**<br>**2. The applicants to pay the respondents' costs to be assessed** |
| CATCHWORDS: | CONTRACTS -GENERAL CONTRACTUAL PRINCIPLES - OFFER AND ACCEPTANCE - whether contract formed by exchange of correspondence<br><br>*Australian Energy Limited v Lennard Oil NL* [1986] 2 Qd R 216, considered |
| COUNSEL: | M M Stewart SC for the applicants<br>J A Griffin QC for the respondents |
| SOLICITORS: | Deacons for the applicants<br>Carter Newell, Lawyers for the respondents |

[1] The applicants, Stephen Stening and Douglas Bates seek a declaration that their acceptance of an offer made by the respondent, Alastair Healey on behalf of himself and his wife Christina Healey as trustees, brought into being a valid and enforceable agreement. The alleged agreement relates to shares in FIIG Securities Limited "(FIIG)" an unlisted public company.

[2] Two categories of shares have been issued in FIGG – ordinary shares and K class redeemable preference shares. As at 13 August 2004 the ordinary shares were held

by Mr Healey (120), Mr Stening (180), Mr Bates (40) and Mr Bates' company Phoroneus Pty Ltd (60). Each of Alastair and Christina Healey as trustees of the Healey Family Trust, Stephen and Claire Stening as trustees of the Stening Family Trust and Phoroneus Pty Ltd as trustee of the DD Bates Family Trust owned 24,000 $1.00 K class redeemable preference shares. Each of Mr Healey, Mr Stening and Mr Bates was a director of FIIG immediately prior to 13 September 2004.

[3] A Simon Watkin had been the owner of both classes of shares in FIIG and had been desirous of selling those shares in accordance with FIIG's constitution. To that end, PricewaterhouseCoopers was retained to ascertain the fair market value of those shares and report to the shareholders. This it did in August 2004.

[4] On 13 August 2004 the following communication was received by Mr Stening and Mr Bates from Mr Healey,

> "Jim Stening
> Managing Director
>
> Douglas Bates QC
> Barrister
>
> 13 August 2004
>
> Dear Jim and Doug,
>
> I have decided to resign, both as an employee and as a Director of FIIG Securities Ltd. I am happy to work for the month, but if we can reach a mutually agreeable way for me to leave immediately, that would be best for all of us, as I see it.
>
> I wish both you two and the company well for the future.
>
> In accordance with the Constitution, I also offer my shares for sale. As you know, these comprise:
>
> 1. 120 X $0.50 ordinary shares held in the name of Alastair Healey; and
>
> 2. $24,000 X $1.00 K class redeemable preference shares held by Mr Healey and Mrs Healey, ATF the Healey Family Trust.
>
> In view of the fact that the company has recently received a current valuation, undertaken by PriceWaterHouseCoopers, the [price I will accept for my shares is:
>
> | | | |
> |---|---|---|
> | 1. | 30% of the shares in FIIG | $419,760 |
> | 2. | +K Class preference shares | $24,000 |
> | | Total: | $443,760 |

This accords with the amount and terms and conditions we have accepted as the appropriate figure for the purchase of the shares held by Simon Watkin and his interests, so I believe it is the appropriate price and conditions for them.

Of course, I expect to receive all amounts that may be due to me as an officer of the company and on account of my employment.

Regards,

(signature)

Alastair Healey
Executive Director"

[5] On 31 August 2004 Mr Bates sent an email to "The Healeys" with copy to Mr Stening purporting to accept Mr Healey's offer.

"From: Douglas Bates
Sent: Tuesday, 31 August 2004 1:17PM
To: 'The Healeys'
Cc: Jim Stening (E-mail)
Subject: Acceptance

Dear Alastair,

I refer to your letter dated 13 August 2004.

Jim and I accept the offer to sell the 24,000 X $1.00 K Class Redeemable Preference Shares held by Mr Healey and Mrs Healey as trustees of the Healey Family Trust for the sum of $24,000.00.

As to the ordinary shares, Jim and I will respond by 13 September 2004 and, in fact, hope to respond by Wednesday 8 September 2004.

FIIG will also be in a position to inform you of your entitlements by 13 September 2004 (if not earlier on 8 September 2004).

Please note that I am authorised by Jim to send this email on Jim's behalf.

Yours sincerely,

Douglas"

[6] There was no response to that email from Mr Healey. On 6 September 2004 Mr Bates and Mr Stening in a joint letter to Mr and Mrs Healey as trustees of the Healey Family Trust wrote concerning the transfer of the shares and payment for them. The letter commenced

> "We refer to the offer to sell 24,000 x K class redeemable for $24,000.00 in your letter dated 13 August 2004 and the acceptance of that offer in Douglas' email dated 31 August 2004 ("the contract")."

[7] By letter dated 9 September 2004 Mr Healey's solicitors wrote that since an identical parcel of shares (Mr Watkin's) had recently been valued by PricewaterhouseCoopers Mr Healey had adopted the same basis in his offer of 13 August and continued

> "The email from Mr Bates of 31 August, 2004 was not an acceptance of our clients' offer. It was a counter offer to acquire only the K Class preference shares and we are instructed to advise you that that counter offer is rejected by our clients.
>
> We are further instructed to advise you that our clients' original offer of 13 August, 2004 remains open for acceptance and may be accepted at any time up to 430pm Friday, 10 September, 2004. If not accepted by that time, the offer to sell will lapse and be deemed to have been withdrawn.
>
> In addition, we are instructed to confirm that counter offers will not be considered and if a counter offer is made, it will be construed as a rejection of the offer made by our client."

[8] The applicants' solicitors responded on 10 September clarifying for whom they and the respondents' solicitors acted and asserted that the acceptance of the offer of the preference shares was not conditional upon the acceptance of an offer in relation to ordinary shares and rejected the offer for the ordinary shares.

[9] On 23 September 2004 the applicants' solicitors nominated 30 September at 3pm at the solicitors' Brisbane office for the completion of the contract. On the date appointed Mr Healey's solicitor indicated that settlement would not be effected. On settlement date a bank cheque in the sum of $24,000 made payable to Mr and Mrs Healey as trustees for the Healey Family Trust was tendered.

[10] Rule 28 of FIIG's constitution deals with restriction on the ownership, sale or disposal of shares in the company. By r 28.1(a)(vii) "shares" means "the ordinary shares and the "K" class redeemable preference shares of FIGG Securities limited." Rule 28.2 provides that no person may own shares in the company unless the person is a director or an employee or comes within other categories of persons not here relevant. When a shareholder ceases to be entitled to own shares the shareholder must sell those shares in accordance with r 28.3.

[11] By r 28.3(a)

> "If a Shareholder wishes, or is required by Rule 28, to sell all or part of his or her Shares, he or she must offer in writing to sell the Shares to each of the remaining Shareholders at the Fair Market Value of the Shares as at that date."

By r 28.2(b) the shares are to be offered to the remaining shareholders on an equal basis and if any shareholder does not purchase the shares so offered then they are to be offered on a pro-rata basis to the other remaining shareholders. If there is an agreement between the buyer and the seller of the shares as to the fair market value of the shares then the shareholders must complete the transfer within 30 days of the date of the agreement.

[12] By r 28.3(d)

> "If there is no agreement by the Shareholders, who are selling and purchasing the Shares, as to the Fair Market Value of the Shares, then an independent valuation of the Fair Market Value of the Shares must be obtained by the Shareholders from an agreed firm of accountants or, failing agreement upon a firm of accountants, by the Brisbane office of PricewaterhouseCoopers."

[13] By r 28.3(h) if none of the remaining shareholders wish to purchase the shares at fair market value only then may a shareholder sell shares to a third party who is not a competitor at any price negotiated by the shareholder. Any such proposed sale must be approved by the directors of FIIG.

[14] The issue for resolution may be simply stated – was the offer to sell "his" shares by Mr Healey, in effect, two offers to sell two separate parcels of shares either or both of which might be accepted at the price proposed or was it a single offer which required purchase of both parcels?

[15] It is as well to dispose of a preliminary point made by Mr Griffin QC for the respondents. His submission proceeds as follows: shares in FIIG may only be disposed of in accordance with its constitution. The offer is expressed to be such a disposition but is not. This flows from r 28.3(a) which requires a shareholder to offer the shares "to each of the remaining Shareholders" in writing. Mr Healey's offer was made only to Mr Bates and Mr Stening. The other shareholders were Mr and Mrs Stening as trustees for the Stening Family Trust and Phoroneus Pty Ltd as trustee for the DD Bates Family Trust. Accordingly, the offer was not made in accordance with the constitution.

[16] There was no misunderstanding as to who was offering what shares to whom. It would be artificial in the extreme to suggest otherwise. Although Mr Healey signed the offer himself he clearly meant and was understood by Mr Stening and Mr Bates to be offering the K class redeemable preferential shares as trustee together with his co-trustee. This is reflected in the description of those shares in the body of the offer. It is reflected in the purported acceptance. Equally the offer was to all the remaining shareholders and the purported acceptance by Mr Bates is expressed to be on his own behalf and on behalf of Mr Stening and as trustees or a controller of a trustee. There is nothing in that point.

[17] The resolution of this matter revolves around a consideration of the offer, informed by the constitution, to ascertain Mr Healey's presumed intention. Mr Healey offered "my shares for sale". Strictly, shares fulfilling that description were the ordinary 50c shares. But Mr Healey immediately more fully described them as the ordinary shares in his name and the K class preferential shares held by himself and his wife as trustees.

[18] He wrote that "the price I will accept for my shares" – clearly being a reference to the two types of shares – is, $419,760 for the ordinary shares plus $24,000 for the K class preference shares making a total of $443,760. He then stated that "this", not "these", accords with "the amount", not amounts, accepted as the appropriate "figure" for the purchase of shares held by Simon Watkin and his interests and was the appropriate "price" for them. There are only two figures involved. The arithmetic is not complex. If two offers were being made there was no need to include a total.

[19] On its face, by use of a total figure rather than leaving the individual amounts against each identified parcel of shares and using the singular to refer to the price, the offer evinces an intention to make one offer for both parcels.

[20] Does the constitution operate against this conclusion? Mr Stewart, for the applicants, submits that it does. His argument is that no aspect of the constitution requires the holder of preferential shares who is desirous of selling to be required to sell any ordinary shares which he or she (or it) might hold in the same or some other capacity at the same time. Put another way, the constitution does not admit of conditional sales, that is, "you may only buy my K class shares if you also buy my ordinary shares". This was not a conditional sale. There was nothing inconsistent with the constitution in a single offer to sell both classes of shares. Mr Healey proposed a price for all his shares and showed how it was achieved. It was open to the remaining shareholders to disagree that the amounts constituted fair market value for either or both classes of shares and to avail themselves of the procedure in the constitution if they wished to purchase them.

[21] Finally, Mr Stewart contended that by making no protest following the acceptance of the K class preference shares on 31 August it was not open to the respondent to argue for a different view of the offer, *Australian Energy Limited v Lennard Oil NL* [1986] 2 Qd R 216, 237. The failure to protest at the applicants' erroneous understanding does not have the effect of supporting the applicants' construction of the offer. The acceptance of the K class preference shares at the price offered could have been reasonably interpreted by Mr Healey as uncontroversial but that the price of the ordinary shares required further consideration. The applicants indicated that they would get back on 13 September.

[22] On the construction of the offer which I have preferred the application should be dismissed with costs.