SUPREME COURT OF QUEENSLAND

CITATION:	*JV Property Syndicates Pty Ltd v Croakybill Ltd* [2005] QSC 231
PARTIES:	**JV PROPERTY SYNDICATES PTY LTD** **ACN 050 921 036** (plaintiff) **v.** **CROAKYBILL LIMITED** (defendant)
FILE NO:	3121 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2005
JUDGE:	Helman J.
CATCHWORDS:	Options – assignment of put and call option agreement recorded in deed – whether benefit of deed effectively assigned – whether plaintiff entitled to exercise option *Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd* [1968] 1 W.LR. 74; [1968] 1 All E.R. 104 *Rushton (SA) Pty Ltd & Ors v Holzberger & Ors* [2003] QCA 106 rule 483 *Civil Procedure Rules* 1999 ss.55, 199 *Property Law Act* 1974
COUNSEL:	Mr S.S.W. Couper Q.C. for the applicant-defendant Messrs K.D. Dorney Q.C. and M.J. Taylor for the respondent-plaintiff
SOLICITORS:	Home Wilkinson Lowry for the defendant Flower & Hart for the plaintiff

[1] This matter came before me by way of the defendant's amended application filed on 9 May 2005 for an order that there be a separate determination of, and declaration made in respect of, issues that have arisen in this proceeding, which was begun by claim on 15 April 2005. The parties are in agreement that the issues in question should be determined pursuant to rule 483 of the *Uniform Civil Procedure Rules* 1999.

[2] In the principal proceeding the plaintiff seeks specific performance of a put-and-call option agreement recorded in a deed dated 12 October 2004 between the defendant as owner and Citimark Properties Pty Ltd as grantee: exhibit 1. Damages in addition to,

and in lieu of, specific performance are also sought. The preamble to the deed records that the defendant is the registered owner of land of which the land the subject of the agreement (proposed lot 501 Norman Road, Rockhampton) forms part, that the defendant grants to Citimark the call option to purchase proposed lot 501, and that the defendant has agreed to grant the call option 'on the basis' that the defendant will have the right to cause Citimark to purchase the proposed lot by exercising the put option.

[3] Clause 3.2 of the deed provides that, in consideration of the option fee ($10,000), the defendant offers to sell the proposed lot to Citimark or its nominee for the price and on the terms set out in a contract in the form set out in the schedule to the deed. Clause 3.3 provides that the offer referred to in clause 3.2 is irrevocable until, and will lapse without further notice to Citimark on the expiry date (the date twenty-one days after the defendant gives notice to Citimark that a separate title has issued for the proposed lot). Clause 7.1 provides that, in consideration of the defendant's granting the call option, Citimark grants the defendant a right to require Citimark to purchase the proposed lot for the price and on the terms set out in a contract in the form set out in the schedule to the deed. Clause 8 provides for the exercise of the put option, and Clause 8.4 provides that the defendant acknowledges that the put option cannot be exercised if the call option is exercised. Clauses 13 (Applications by Grantee) and 14 (Assignment of Call Option) are as follows:

> **13 Applications by Grantee**
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> 13.1 The Grantee may, with its authorised consultants enter the Property and:-
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> (a) conduct tests or inspections;
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> (b) carry out surveys and drill holes;
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> (c) conduct engineering, building and geotechnical investigations; and
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> (d) erect any signs required by law in connection with any planning application in respect of the Property.
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> 13.2 Before exercising its rights under Clause 13.1 the Grantee will:
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> (a) notify the Owner and cause the least disturbance possible to the Owner or to any occupier of the Property; and
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> (b) take out and keep in force an insurance policy in the name of the Grantee noting the interest of the Owner for an amount of not less than $10,000,000 for any one event including indemnity in respect of all claims, demands and actions in respect of injury, loss or damage to any person pr [*sic*] property howsoever sustained arising from or contributed to by the exercise by the Grantee and any of its servants, agents, workman, architects, surveyors, engineers or other consultants of the right of entry.
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> 13.3 After exercising its rights under Clause 13.1 the Grantee will restore the Property as nearly as possible to its prior condition.

If the Grantee fails to do so the Owner may recover the costs of doing so from the Grantee.

13.4 If requested by the Grantee, the Owner will execute any documents necessary to allow the Grantee to apply for any consent or approval in relation to the Property.

13.5 The Grantee indemnifies the Owner against all damages and expenses incurred in connection with or contributed to by the exercise by the Grantee of its rights under Clauses 5.4 13.1 and 13.4.

14 Assignment of Call Option

14.1 The benefit of this Deed may be assigned by the Grantee.

14.2 If this Deed is assigned the Grantee

(a) will give notice in writing to the Owner;
(b) will obtain a covenant from the assignee to be bound by this Deed; and
(c) will remain liable to the Owner for due performance by the assignee of all obligations contained in this Deed and the Contract.

[4] In a letter dated 2 March 2005 from solicitors for Citimark to the solicitors for the defendant, Citimark claimed to have assigned the benefit of the option agreement to the plaintiff. Enclosed with the letter was a copy of a deed of assignment of option dated 2 March 2005 between Citimark as assignor and the plaintiff as assignee, and a contract of sale dated 2 March 2005 between the plaintiff as purchaser and the defendant as vendor.

[5] Clause 2 (Assignment) of the deed of assignment of option was as follows:

2 Assignment

2.1 The Assignment Fee [$10,000] will be payable by the Assignee to the Assignor on the date of this Deed.

2.2 In consideration for the Assignment Fee, the Assignor assigns to the Assignee its right, title and interest in the Option [the option to purchase dated 12 October 2004], and any existing or future rights or claims the Assignor has under the Option against the Owner.

2.3 The Assignee agrees to take an assignment of the Option and covenants to comply with the terms of the Option.

2.4 The Assignee indemnifies the Assignor for any cost, loss or damage which the Assignor may suffer as a result of the Assignee failing to observe or perform any

of the obligations of the Assignor under the Option or the Contract attached to the Option.

2.5 The Assignor agrees to give notice of the assignment of the Option to the Owner in the form of the notice attached and marked 'A'.

2.6 The Assignee and the Assignor will sign any other documents necessary to give effect to the terms and intent of this Deed.

[6] The issues for my determination have been defined in the pleadings: paragraph 9 of the statement of claim, paragraph 6 of the defence, and paragraph 2 of the reply to the defence:

Statement of claim

9. By letter from the solicitors for Citimark, Messrs Connor O'Meara, dated the 2nd day of March 2005 and delivered that day to the Plaintiff to the solicitors for the Defendant, the solicitors for Citimark:

(a) Gave notice that Citimark had assigned the benefit of the Option Agreement;
(b) Provided a copy of the Deed of Assignment of the Call Option;
(c) Enclosed two copies of the REIQ Contract executed by the Plaintiff as Purchaser with the name and address of the Purchaser completed;
(d) Forwarded a cheque for $65,000.00 on behalf of the Plaintiff, being the balance of the deposit due under the Contract; and
(e) Gave notice that they acted for the Plaintiff.

Defence

6. As to paragraph 9 of the Statement of Claim;

(a) the defendant admits the allegations therein;
(b) the defendant denies that the notice referred to in paragraph 9(a) or the Deed of Assignment referred to in paragraph 9(b) of the Statement of Claim were effective to assign the benefit of the option agreement on the ground that the Deed of Assignment of the Call Option did not contain and Citimark did not otherwise obtain at any material time a Deed of Covenant in favour of the defendant from the plaintiff in accordance with clause 14.2(b) of the Option Agreement;
(c) the defendant denies that any contract for the sale of land came into existence between the defendant and the

plaintiff on the grounds referred to in paragraph 6(b) herein.

Reply

2. As to paragraph 6(b) of the Defence, the plaintiff denies the allegation that there was no effective assignment of the benefit of the Option Agreement because it is wrong in law since:

(a) Clause 14.1 of the Option Agreement provided only that it was the benefit of the Option Agreement which could be assigned;

(b) on its true construction, any compliance with Clause 14.2(b) of the Option Agreement was not a pre-condition, or condition precedent, to any effective assignment of such benefit;

(c) further, or alternatively, Clause 14.2(b) was complied with by the terms of Clause 2.3 of the Deed of Assignment of the Call Option made 2 March, 2005;

(d) further, or alternatively, on its true construction, Clause 14.2(b) became unnecessary and superfluous and, therefore, unnecessary for an effective assignment once the statutory notice in writing of the assignment under s.199 of the *Property Law Act 1974* was given by the plaintiff to the defendant on 2 March, 2005 in circumstances where Clause 8.4 of the Option Agreement stated that the defendant acknowledged that the Put Option could not be exercised if the Call Option was exercised and where, upon giving such statutory notice, there was a contemporaneous exercise by the plaintiff of the assigned Call Option;

(e) further, or alternatively, a breach (if any) of Clause 14.2(b) was a breach of the Option Agreement only and did not render the assignment of the Call Option ineffective;

(f) further, or alternatively, on its true construction, Clause 14.2(b) required only that the grantee would, as a condition subsequent to the assignment of the Call Option, obtain such a covenant and Citimark Properties Pty Ltd ('Citimark'), by letter of its solicitors, Connor O'Meara, sent by facsimile on 30 March, 2005 to the solicitors for the defendant indicated a continuing willingness that Citimark would provide such a covenant signed by the plaintiff, as assignee, directly in favour of the defendant;

(g) further, or alternatively, on its true construction, Clause 14.2(b) did not require the execution of a Deed of Covenant, particularly in circumstances where s. 55 of

> the *Property Law Act 1974* enabled the defendant, as beneficiary of Clause 2.3 of the Deed of Assignment of the Call Option, to accept such benefit within the terms of s. 55(6) of that Act.

[7] The defendant seeks the following declarations:

> (a) That the benefit of the deed made on 12 October 2004 between it and Citimark was not effectively assigned by Citimark to the plaintiff; and
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> (b) The plaintiff was not entitled to exercise the option contained in that deed.

[8] The assignment clause in question, like an option clause, is in the category of an 'if' contract (as to which see *United Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd* [1968] 1 W.LR. 74 at pp. 83-84; [1968] 1 All E.R. 104 at pp. 109-110 per Diplock L.J.). The terms of such a contract must be strictly complied with:

> There are numerous cases establishing the proposition that the terms of an option clause must be strictly complied with. One of the most frequently quoted passages in that regard is from the judgment of Lord Denning M.R. in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 at 81:
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> > "In order to exercise the option, the lessee must give the notice in the specified time and he must fulfil the covenants to repair according to their terms. He is not entitled to excuse himself by saying that the want of repair is trifling. … In point of legal analysis, the grant of an option in such cases, is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer."
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> In the same case Edmund Davies LJ said at 87 that 'strict compliance with the conditions was essential if UDT chose to exercise their right to call upon Eagle to repurchase. That compliance being absent, the obligation of Eagle to repurchase never came into existence'.
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> There was reference in that case to the earlier decision of the Court of Appeal in *Hare v Nicoll* (1966) 2 QB 130. Both Willmer L.J. at 141 and Winn L.J. at 148 spoke of the necessity to comply strictly with the conditions stipulated for the exercise of an option.
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> Lord Diplock quoted the passage referred to above from the judgment of Lord Denning MR with approval in *United Scientific Holdings Ltd v Burnley Borough Council* (1978) AC 904 at 929. His Lordship went on to say: 'Exact compliance with the terms of the offer in an "if contract" had been required in courts of equity as well in courts of common law; see *Weston v Collins* (1865) 12 LT 4;

> *Finch v Underwood* (1876) 2 Ch D 310.' (See also per Lord Simon of Glaisdale at 945 and Lord Salmon at 951).
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> Those principles, and the reasoning involved, have been followed in Australia. That was essentially the approach of the Full Court of New South Wales in Gilbert J. *McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1959) SR (NSW) 122 and of de Jersey J. (as he then was) in *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd R 101 especially at 103. In the latter case the learned judge said that the 'due exercise of the option of renewal … depended on exact compliance with its notice requirement.'

(*Rushton (SA) Pty Ltd & Ors v. Holzberger & Ors.* [2003] Q.C.A. 106 paragraphs 14 to 18 per Williams J.A., with whom McMurdo P. and Philippides J. agreed).

[9] The resolution of the issues between the parties before me depends on the correct construction to be put upon clause 14 of the option agreement. That construction is to be determined objectively: *Pacific Carriers Ltd v. BNP Paribas* (2004) 78 A.L.J.R. 1045, at p. 1050. On behalf of the defendant it is contended that strict compliance with paragraphs (a) and (b) of clause 14.2 was a condition precedent to an effective assignment. The wording is 'a little awkward' but the intention is plain, it was argued on their behalf - awkward because by the words '[i]f this deed is assigned' must be intended 'if the grantee has agreed to assign this deed', it was argued. That in my view is in essence correct, although it would be better expressed as 'if the grantee has agreed to assign the benefit of this option agreement'.

[10] It cannot be doubted that notice in writing to the defendant of an assignment required by paragraph (a) is necessary for the effectiveness of the assignment and so may properly be regarded as a condition precedent to effectiveness. Why the requirement of paragraph (b) should be in a different category – a condition subsequent to be complied with within a reasonable time, as was argued for the plaintiff – is not at all clear. The better view, one appealing to common sense in my view, is that the latter requirement falls into the same category as the former. But just as the position of paragraph (b) after paragraph (a) assists in its construction, so does its position before paragraph (c). Paragraphs (b) and (c) of clause 14.2 contain provisions the object of which is clearly enough to provide protection to the defendant, and would have been understood by a reasonable person in the position of Citimark as such: first, by ensuring that the assignee is bound by the obligations in the deed, prominent among which are the obligations in clauses 7 and 13; and secondly, by providing that Citimark remains liable to perform all its obligations provided for in the deed and contract. The absence of provision in the deed as to the time within which the covenant was to be obtained from the assignee and the consequences of failure to do so supports the argument that that requirement is a condition precedent and not a condition subsequent.

[11] It is contended on behalf of the plaintiff that the requirement of paragraph (b) of clause 14.2 was complied with in clause 2.3 of the deed of assignment, but that provision is not the covenant contemplated by the deed of 12 October 2004 because it does not confer rights upon the defendant except possibly by operation of s. 55 of the *Property Law Act* 1974. It was submitted on behalf of the plaintiff that clause 2.3 can properly be regarded as a promise to do an act for the benefit of a beneficiary, viz the defendant, but it might be argued that since the defendant is not named in the deed as a

beneficiary of the promise there could be uncertainty as to that matter. Further, and more importantly, s. 55(2) permits promisor and promisee, without the consent of the beneficiary, to vary or discharge the terms of the promise prior to acceptance by the beneficiary, thus rendering the rights of the defendant more uncertain. In addition, s. 55(4) makes available to the promisor, against the beneficiary, defences which would otherwise be available against the promisee. That results in further uncertainty as to the defendant's position.

[12] It is said on behalf of the plaintiff that clause 14.2(b) became unnecessary and superfluous because the defendant received notice of the assignment and the plaintiff gave notice of the exercise of the call option on the same day thereby precluding, by operation of clause 8.4, any exercise of the put option, but those subsequent events cannot assist in the construction of clause 14 in my view.

[13] The plaintiff asserts that a breach of clause 14.2(b) was a breach of the option agreement only and did not render the assignment of the call option ineffective. The answer to that is that it seems obvious that what is intended in paragraph (b) of clause 14.2 is a direct right against the assignee of the option agreement.

[14] It follows that the defendant is entitled to the relief it seeks. I shall invite further submissions on the form of the orders to be made, and costs.