SUPREME COURT OF QUEENSLAND

CITATION:	*Jet Development Pty Ltd & Anor v Denning* [2006] QSC 357
PARTIES:	**JET DEVELOPMENT PTY LTD ACN 107 913 762** (first plaintiff) and **FERNVALE PROJECT PTY LTD ACN 119 408 767** (second plaintiff) **v** **ROYALIN MARGARET DENNING** (defendant)
FILE NO:	BS4879 of 2006
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	5 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2006
JUDGE:	Chesterman J
ORDER:	**1. A declaration that the put and call option agreement between the first plaintiff and the defendant dated 24 June 2005 is binding on the parties.** **2. The defendant must specifically perform the contract of sale which followed in exercise of the option on 27 April 2006.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION FOR NON-PERFORMANCE – ELECTION AND RESCISSION – LOSS OR WAIVER OF RIGHT TO RESCIND – alleged breaches of agreement – whether defendant subsequently affirmed agreement CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – OTHER MATTERS – variation of agreement by correspondence – whether binding – notices clause – whether simultaneous delivery of notices satisfied term requiring sequential notices *Masters v Cameron* (1954) 91 CLR 353, applied

COUNSEL:	J W Peden for the plaintiffs P J Favell for the defendant
SOLICITORS:	Flower & Hart for the plaintiffs Morgan Conley for the defendant

[1] The defendant owns land in the village of Fernvale. It has been the site of a sawmill since 1922. On 24 June 2005 the defendant and the first plaintiff made a written contract to effect the sale of the defendant's land. The contract was described as a 'put and call option' ('option agreement'). By the terms of the option agreement Mrs Denning was designated 'the Seller' and the first plaintiff 'the Buyer'. For consideration the defendant granted the first plaintiff an option to purchase the land on the terms and conditions contained in the attached contract of sale and which was in the standard form. By clause 3.1 the first plaintiff could exercise its option within a specified period which expired on 30 April 2006. The option could be exercised:

> '… only … by delivery to the Seller … of:-
>
> (a) a written notice generally in the form contained in Schedule 2; and
>
> (b) two copies of the Sale Contract signed by the Buyer or the Nominee.'

It was agreed that the call option would lapse 'if … not exercised strictly in accordance' with the preceding requirement.

[2] By clause 3.3 it was agreed that:

> 'On exercise of the … Option, the Seller and the Buyer are immediately bound to respectively sell and purchase the Property in accordance with the Sale Contract. The Sale Contract will be taken to have been entered into on the date of exercise of the … Option, regardless of whether the Sale Contract is signed by the buyer [or] the seller.'

[3] By clause 4.1 it was agreed that:

> 'The Buyer may at any time before the Buyer exercises the … Option by written notice to the Seller nominate a person to exercise the Call Option. On receipt of that notice any reference in this Agreement to the Buyer will be construed as a reference to the Nominee.'

[4] Clause 11 takes on some significance for the defendant's case. It provides:

> 'The parties must maintain confidentiality concerning the terms of this Agreement. No public announcement or communication relating to the negotiations of the parties or the existence, subject matter or terms of this Agreement, may be made or authorised by a party,

> except that a party may make disclosures it considers reasonably necessary:-
>
> (a) to its professional advisers, bankers, financial advisers and financiers, under a duty of confidentiality; or
>
> (b) to any authority in connection with any application …'

[5] On 26 April 2006 the defendant's then solicitors wrote to the first plaintiff's solicitors to advise that Mr Denning had instructed them that the first plaintiff:

> '… has breached its confidentiality obligations under Clause 11.1 of the Put and Call Option Agreement despite … previous communications … emphasising the importance of confidentiality to our client.
>
> …
>
> Your client's breach of the confidentiality provision has a significant negative impact on our client's current and future operation of the sawmill.
>
> By reason of your client's breach … we hereby give formal notice of our client's termination of the Contract with immediate effect.'

It should be pointed out that the comment in the letter of rescission is incorrect. The defendant did not operate the sawmill. She transferred the business to her son who had previously managed it for her. He was the owner of the sawmilling business and its parts and machinery.

[6] The first plaintiff did not accept the purported rescission. On 27 April 2006 it delivered documents to the defendant's solicitors which it claims constituted a valid exercise of the option thereby obliging the defendant to convey the land to the plaintiff in exchange for the purchase price, in accordance with the terms of the contracts annexed to the agreement. On 2 October 2006, the date fixed by the contract for settlement, the second plaintiff, which had been nominated by the first plaintiff pursuant to the agreement, duly tendered the purchase price to the defendant's solicitors who, on instructions, refused to accept the bank cheques and did not provide a conveyance of the land.

[7] The plaintiffs have commenced this action to compel the defendant to perform the contract of sale.

[8] The defendant raises three points to resist the plaintiff's claim. More were taken in the delivered defence but all points save these three have been abandoned. The points are:

1. The plaintiff's breach of clause 11.

2. The plaintiff's failure to exercise the option strictly in accordance with the terms of the agreement.

3. That the agreement was in effect abandoned by subsequent negotiations to vary the agreement which came to nothing.

[9] Fernvale is a small community. Word that the sawmill land might have been sold spread quickly as rumour or gossip within weeks. Mrs Denning was in Victoria when she signed the option agreement. On her return to Fernvale in October of 2005 she heard the rumours and was annoyed. Some attempt was made in the evidence to establish that Mr Gardner, the plaintiff's principal, or his estate agents, Mr Zabel and Mr Gregor, had, in breach of clause 11, divulged information about the agreement to the citizenry of Fernvale. In the end only two particulars of the alleged breach of clause 11 were relied upon: the delivery by Mr Gardner to Mr Gregor of a copy of the option agreement; and the oral disclosure by Mr Gardner to council officers of the first plaintiff's interest in the property. The two facts are established by the evidence. However neither operates to give the defendant a basis for refusing to complete the contract of sale, or to have rescinded it.

[10] The letter from the first plaintiff under the hand of Mr Gardner to Mr Gregor enclosing a copy of the option agreement is dated 6 June 2005, eighteen days before the option agreement had been executed. The provision of the copy to Mr Gregor cannot have been a breach of the agreement which did not then exist.

[11] There is another point. Clause 11.1(a) permitted the disclosure of the agreement and its terms to the first plaintiff's "professional advisers … under a duty of confidentiality". Mr Gregor was such an adviser. He had been engaged to find land in Fernvale suitable for development as a shopping centre which the first plaintiff might purchase. He had introduced the first plaintiff to the defendant and the option agreement had resulted. Mr Gregor's employer was entitled to commission having successfully completed its retainer. Commission was payable when the option agreement resulted in a completed contract of sale. Mr Gardner sent Mr Gregor a copy of the agreement as evidence that he had duly completed the task for which he had been engaged and was entitled to commission. The provision of the copy was "reasonably necessary" so that the business relationship between the plaintiffs and the estate agents was properly documented. The communication was therefore allowed by clause 11.1(a) if made under a duty of confidentiality. There is no doubt that both Mr Zabel and Mr Gregor understood that the existence of the option agreement and its terms were confidential.

[12] The second event by which it is said clause 11 was breached has no more substance. Mr Gardner did speak to the Chief Executive Officer of the Esk Shire Council and one of its town planners but he did so only for the purpose of ascertaining the council's attitude towards a development application for the land. It was "reasonably necessary" for him to have that conversation. It is one contemplated by clause 11.1(b).

[13] There are other answers. Mrs Denning was aware that news of the intended sale of the sawmill had become, if not widely known, the subject of widespread speculation. She was, it seems, genuinely annoyed about that. She complained to Mr Gardner on a few occasions but he assured her that he had respected the obligation of confidentiality. On 24 November 2005 the first plaintiff made an application to the Esk Shire Council for approval to develop the sawmill site. Mrs Denning signed the application and communicated her consent, as the landowner, to the application. This was after she was aware of the fact that the existence of the

option agreement had been divulged and she believed that Mr Gardner was responsible, in breach of clause 11. With that knowledge and that belief she supported the first plaintiff's development application. It is a clear case of affirmation of the contract subsequent to breach.

[14] Another act of affirmation occurred in March of the following year, 2006. At that time Mr Gardner and Mrs Denning met to negotiate a variation to the agreement which would extend the option period and allowed the defendant to remain in occupation of the site to the end of December 2006, three months after settlement. It is this variation on which the defendant relies to argue that the option agreement came to an end. That point will be considered next but for the moment it is enough to point out that the negotiation, which did result in a variation, was another clear affirmation. It occurred at a time when Mrs Denning was complaining about communications made in breach of clause 11.

[15] Another answer is that by the time the defendant purported to rescind the contract for breach of clause 11, this clause had ceased to have any real consequence. On 12 April 2006 the Esk Shire Council met to consider the first plaintiff's development application. It was approved. The Council met in public and its minutes were published on its website. Journalists attended the meeting and one published a short report of the approval of the application on 21 April 2006. By this publication it became common knowledge that the sawmill was for sale and the plaintiff had bought it intending to erect a shopping centre. If, which I doubt, clause 11 ever had effect as a term of such importance that breach of it would entitle the defendant to rescind, it had ceased to have that character after 12 April 2006. The purported rescission occurred on 26 April.

[16] Mr Gardner and Mrs Denning met on 16 March 2006 to discuss her concern that her son was experiencing difficulties in obtaining a site to which he could relocate the sawmill. They reached agreement that the defendant could remain in possession of the land after settlement and that her son could continue the sawmilling operations until 31 December 2006.

[17] On 23 March 2006 the plaintiff's solicitors wrote to the defendant's solicitors:

> "Our client and yours, met last week … At that meeting one solution discussed to alleviate your client's concerns about the operational continuity of the sawmill … and its relocation, was to vary the contract to allow your client to remain in occupation … until 31 December 2006.
>
> Our client … has a right … to lodge a Development Application and commence advertising from 1 April 2006. Our client had intended to lodge an application for Phase 2 for a material change of use … which … would require advertising … shortly after 1 April 2006.
>
> Our client now understands your client's issues with employees and can, if it is more suitable to your client, defer the lodgement of the application … until after settlement on 1 October 2006.
>
> If our client is to give these … concessions, it will put back … phase 2 development … by six months.

> Our client would ideally like further time to establish the development entity for the project which needs to be done before the … Option is exercised and would agree to make these concessions, on the basis that the date for exercise of the … Option … so that instead of the … Option exercise date being *30 April 2006*, the … Date becomes 1 September 2006.
>
> Can you please let us have your client's instructions as to whether these amendments are acceptable to your client, and if so, we will prepare a Deed of Variation of the Option Agreement.'

[18] On 28 March 2006 the defendant's solicitors replied:

> 'We advise that our client agrees to the proposal contained therein. We further confirm that the settlement date for the sale is to remain as 1 October 2006.
>
> Our client has requested that we specifically advise you of her concern with respect to your client's agent breaching its confidentiality obligations. We trust that your client will impress upon the agent the importance of the confidentiality provisions.'

[19] On 20 April 2006 the parties' solicitors communicated by telephone and facsimile with a view to preparing the deed of variation. One was drafted but never executed. From this circumstance the defendant submits that the option agreement came to an end. The argument is, presumably, that by the negotiations for the variation the parties agreed to terminate the option agreement but then failed to execute the agreement which was to replace it.

[20] The argument is fanciful. There is not the slightest support in the evidence for the notion that the parties intended to abandon, abrogate or terminate the option agreement. Moreover the correspondence I have set out establishes beyond doubt that the parties in fact reached agreement on a variation to the option agreement. It is true that they contemplated that that agreement of variation would be reduced to a deed to be executed by the parties and that step never occurred. But the agreement is in the first category of contracts described in *Masters v Cameron* (1954) 91 CLR 353 at 360. The correspondence amounted to a contract binding upon the parties at once to perform the agreed terms whether the contemplated formal document came into existence or not.

[21] On 27 April 2006 the plaintiffs' solicitors prepared several documents which they attached to a letter addressed to the defendant's solicitors. The documents were attached to the letter in the order in which they were described in the letter. The letter read:

> '**JET DEVELOPMENT PTY LTD – PURCHASE DENNING**
>
> We refer to the above matter.
>
> We ***enclose*** the following:-

1. Notice of nomination given in accordance with clause 4.1 of the put and call option dated 24 June 2005;

2. Notice of exercise of option given in accordance with clause 3.1(a) of the put and call option dated 24 June 2005;

3. Two copies of the sale contract signed by the nominee given in accordance with clause 3.1(b) of the put and call option dated 24 June 2005.

Pursuant to the ***enclosed*** documents:-

1. Jet Development Pty Ltd has nominated Fernvale Project Pty Ltd … to exercise the call option;

2. Fernvale Project Pty Ltd has exercised the call option to purchase in accordance with its terms;

3. In accordance with clause 6 of the sale contract the guarantor has signed the guarantee attached to the sale contract.

In accordance with clause 7.3 … your firm as stakeholder is to hold the deposit under the sale of contract.

Can you please acknowledge receipt of the ***enclosed*** documents on the enclosed notices and the duplicate of this letter.'

[22] The notice of nomination was addressed to Mrs Denning and was in these terms:

> 'TAKE NOTICE that **JET DEVELOPMENT PTY LTD** … hereby nominates Fernvale Project Pty Ltd … to exercise the option granted to it by the Put and Call Option Agreement dated 24 June 2005 to purchase the Property described in that Agreement.'

The agreement was dated 27 April 2006 and signed by Mr Gardner on behalf of the first plaintiff.

[23] The notice of exercise of the option was also addressed to Mrs Denning, dated 27 April 2006 and signed by Mr Gardner on behalf of the second plaintiff. It read:

> 'TAKE NOTICE that **FERNVALE PROJECT PTY LTD** … (as nominee of Jet Development Pty Ltd) exercises the option granted to it by the Put and Call Option Agreement dated 24 June 2005 to purchase the Property described in that Agreement.'

[24] It is not necessary to notice the terms of the contracts of sale which were also attached to the plaintiff's solicitor's letter.

[25] The documents were taken by a young solicitor to the defendant's solicitors and duly handed to the receptionist who, as requested, wrote an acknowledgement of

service on the notice of nomination and notice of exercise of option. She dated them both '27/04/06 3.10pm'.

[26] The defendant's point is that clause 3 of the option agreement, which had to be complied with strictly, required the nomination to occur prior to the exercise by the nominee of the option. The delivery of the documents at the same time means, it was submitted, that the nomination and exercise had occurred simultaneously, not sequentially, and thus in a manner not permitted by the agreement.

[27] This is nonsense. The defendant's counsel was forced to agree that if the shortest imaginable period of time had elapsed between the delivery of the notice of nomination and the delivery of the notice of exercise of option, clause 3.1 would have been satisfied. A split second between delivery of the two documents would comply with the agreement but the delivery of the documents in the form adopted would not. Interests in property are not to be determined by such niceties. The documents enclosed with the plaintiffs' solicitor's letter, and that letter itself, make it clear that the first plaintiff had nominated the second plaintiff as purchaser as permitted by clause 4 of the option agreement prior to the second plaintiff exercising the option to purchase the land. There was a sequential delivery of notices. The letter itself provided for it and was physically arranged so that the notice of nomination would come to the defendant's solicitor's hands before the notice of exercise of option. It would not have mattered if that were not the case. Any adult intelligence would realise from the delivery of the documents in whatever order that they were meant to take effect in the order they were in fact presented.

[28] The second plaintiff has made out its entitlement to a decree for the specific performance of the contract of sale between it and the defendant.

[29] I declare that that contract is binding upon the parties and I order that it be specifically performed and carried into execution. The second plaintiff should prepare minutes of the orders to be made to give effect to this judgment.