SUPREME COURT OF QUEENSLAND

CITATION:	*Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v Todrell Pty Ltd & Anor* [2007] QSC 363
PARTIES:	**TODRELL PTY LTD (ACN 121 850 913)** (plaintiff) **v** **JAMES REMINGTON FINCH and CHRISTINE MARY FINCH** (first defendants) and **JAMES REMINGTON FINCH AND CHRISTINE MARY FINCH AS EXECUTORS OF THE ESTATE OF HELEN MAY FINCH** (second defendants) **AND** **CROYDON CAPITAL PTY LTD (ACN 120 661 458)** (plaintiff) **v** **TODRELL PTY LTD (ACN 121 850 913)** (defendant) and **JAMES REMINGTON FINCH and CHRISTINE MARY FINCH (in their capacity as the personal representatives of the estate of HELEN MAY FINCH)** (second defendants) and **JAMES REMINGTON FINCH and CHRISTINE MARY FINCH** (third defendants)
FILE NO/S:	1308 of 2007 7786 of 2007
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2007; 20 November 2007; 21 November 2007; 22 November 2007
JUDGE:	Chesterman J
ORDER:	**1.That action 1308 of 2007 be dismissed**

2.In action 7786 of 2007 the caveat lodged by the first defendant on the title to Lot 1 on RP 138223 County of Stanley, Parish of Redland title reference 15206164 be removed

3. In action 7786 of 2007, the caveat lodged by the first defendant on the titles to Lots 27 and 28 on RP 116824 County of Stanley Parish of Redland title references 14329059 and 14329060 respectively be removed

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES - where the owners of three parcels of adjoining land intended to sell the properties – where the owners were in negotiations with two property developers Todrell Pty Ltd and Croydon Capital Pty Ltd – where terms were agreed with Todrell at a meeting - where immediately after the meeting a deposit cheque was made out and given to the landowners in return for a receipt – where both parties immediately contacted their solicitors to advise that agreement had been reached and requested formal documents be drafted – where subsequently the landowners entered into a contract with Croydon and sought to disavow any agreement with Todrell – where Todrell sought to enforce the agreement – whether the conduct and actions of the parties was such as to evidence a binding agreement – whether Todrell had a caveatable interest over the properties

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – STATUTE OF FRAUDS – CONTRACTS FOR SALE OR DISPOSISTION OF LAND OR ANY INTEREST IN LAND – NOTE OR MEMORANDUM – MEMORANDUM CONTAINED IN SEVERAL DOCUMENTS - where the only document in relation to the transaction signed by the landowners was a receipt given for the deposit cheque - where that receipt was insufficient memorandum in writing evidencing the agreement as required under s 59 *Property Law Act* 1974 (Qld) - where sometime after the issue of the receipt, the solicitors for both parties drafted the necessary contractual documents – where those documents were executed by Todrell but not by the landowners – whether a document signed by a defendant can be read together with an unsigned document that came into existence some time after the signed document – whether parole evidence can be given of a later unexecuted document - whether Todrell could satisfy s59 by combining the receipt and later transaction documents

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – STATUTE OF FRAUDS – CONTRACTS FOR SALE OR DISPOSISTION OF LAND OR ANY INTEREST IN LAND – NOTE OR MEMORANDUM – where the parties had agreed that the structure of the agreement to transfer the properties to Todrell would be a put

and call option agreement between Todrell and the land owners – where the receipt was intended to be made out to recognise the payment of a deposit in relation to the agreement – where the receipt was made out to a company other than Todrell and referred to a "sale" of the properties rather than a put and call option agreement – whether the receipt and the later documents when side by side necessarily indicated that they referred to the same transaction

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – AGREEMENTS CONTEMPLATING EXECUTION OF FORMAL DOCUMENTS - where the parties reached agreement on terms - where at the time of agreement an attempt was made to execute formal documents and the parties evidenced a desire for the deal to be concluded – where due to unforseen circumstances formal documents could not be drafted until some time later – where the call option period was said to began on the date a deed was executed by the parties – where the landowners never executed any formal document - whether the parties intended not to be bound unless and until the documents were properly executed – whether the agreement could be enforced

Property Law Act 1974 (Qld), s 59

Di Biase v Rezek (1971) 1 NSWLR 735, cited
Elias v George Sahely & Co (Barbados) Ltd [1983] 1 AC 646, applied
Gray v Smith (1889) 43 Ch D 208, applied
Hawkins v Price [1947] Ch 645, applied
Harvey v Edwards Dunlop & Co (1927) 39 CLR 302, applied
Lawrence v Fordham [1922] VLR 705, distinguished
Mainline Investments Pty Ltd v Davlon Pty Ltd (1969) 2 NSWR 392, applied
Masters v Cameron (1954) 91 CLR 353, cited
Marek v Australian Conference Association Pty Ltd [1994] 2 Qd R 521, cited
McBride v Sandland (1918) 25 CLR 69, applied
Stokes v Whicher [1920] 1 Ch 411, applied
Thompson v McInnes (1911) 12 CLR 562, not followed
Timmins v Moreland Street Property Co Ltd [1958] Ch 110, applied

COUNSEL:

In Action 1308/07:
Mr J.C. Bell Q.C., with him Mr P.P McQuade for the plaintiff
Mr R.J. Douglas S.C., with him Mr F.G. Forde for the first and second defendants

In Action 7786/07:
Mr A.B Crowe S.C., with him Mr P.D. Hay for the plaintiff
Mr J.C. Bell Q.C. ,with him Mr P.P McQuade for the first defendant

Mr R.J. Douglas S.C., with him Mr F.G. Forde for the second and third defendants

SOLICITORS: In Action 1308/07
De Vere Lawyers for the plaintiff
Holland & Holland for the first and seconde defendants

In Action 7786/07
Bennett and Philp for the plaintiff
De Vere Lawyers for the first defendant
Holland & Holland for the second and third defendants

[1] James and Christine Finch ('the Finchs') are brother and sister. They are the registered proprietors of two lots of land, 22 and 24 Highview Terrace, Daisy Hill and a separate parcel of land at 19 Greenhill Grove, Daisy Hill. They own the land at Greenhill Grove as executor and executrix of the estate of their late mother whose beneficiaries were her ten children. The land at Highview Terrace is more particularly described as Lots 27 and 28 on registered plan 116824, title references 14329059 and 14329060 respectively ('Lots 27 and 28'). The land at Greenhill Grove is Lot 1 on registered plan 138223, title reference 15206164 ('Lot 1').

[2] Todrell Pty Ltd ('Todrell') is a company owned and controlled by Mr Baptist Romano. They are land developers.

[3] Croydon Capital Pty Ltd ('Croydon') is a company owned and controlled by Mr Daniel Gorman. They, too, are land developers.

[4] Lots 27 and 28 are improved with a house which is Miss Christine Finch's home. Lot 1 had been the family home of the late Mrs Helen Finch, her husband and children. It is a large parcel, about four acres in extent and improved with a single dwelling. It is landlocked but adjoined by Lots 27 and 28 which obviously have a frontage onto Highview Terrace. If amalgamated the two parcels are ripe for development.

[5] Both Todrell and Croydon claim they have the benefit of contracts for the purchase of the three lots from the Finchs who support Croydon's claim and resist Todrell's. Two actions have been brought to determine the validity of the contracts.

[6] In Action 1308 of 2007 Todrell claims against the Finchs declarations:

> '… That the contract in writing between the plaintiff and the first defendants for the put and call option for the purchase of … Lots 1, 27 and 28 … is a valid contract binding on the [Finchs]'.

[7] Todrell has lodged caveats against the titles to the three lots to protect its claimed interest. In Action 7786 of 2007 in which Croydon is plaintiff and Todrell first defendant orders are sought for the removal of the caveats and declarations that Croydon's interest in the lands is not defeated by Todrell's claim asserted in its caveats.

[8] There is no doubt about the execution and validity of contracts made between Croydon and the Finchs for the sale and purchase of the three lots. Each is dated 8 November 2006 and postdate the contracts which Todrell propounds. Their efficacy

is made doubtful only by Todrell's assertions to a right arising from earlier contracts. If Todrell's contracts are unenforceable Croydon may complete its purchase of the lots.

[9] The two actions were heard together, Todrell having the carriage of them as plaintiff seeking to establish its right to the lots. The Finchs resisted the claim. The outcome of that dispute will resolve Croydon's action.

[10] There were three bases put forward by the Finchs to dispute Todrell's claims:

(a) There was, as a matter of fact, no agreement made to sell the land.

(b) If agreement were made it was subject to the execution of formal contract documents so the agreement could not be binding until execution by the Finchs which did not occur.

(c) There is no written memorandum of agreement sufficient to satisfy s 59 of the *Property Law Act* 1974 (Qld) by the Finchs.

[11] It is necessary to turn to the facts. In 2006 the Finchs decided to sell the three lots. Their niece, Marie Butland, had recently begun work as a real estate saleswomen for Highfields County and Toowoomba Real Estate. To assist her career they appointed her and her employer agents to find a purchaser. Their solicitor was Mr Peter Williams.

[12] Mr Romano was friendly with one of the Finch children, a brother of James and Christine Finch. He knew them, but not well. The Finchs had initially been extravagant in their expectation of the value of the lots. By mid-2006 they had lowered those expectations and Mr Romano heard of it. He became interested in buying the lots and told the Finchs of his interest. Subsequently he spoke to officers of the Logan City Council and engaged consultants to assess the development potential of the lots.

[13] On 26 July 2006 he met the Finchs at Miss Finch's home to tell them of his particular interest in buying the properties. They told him that Mr Gorman had already offered about $3,200,000 for the land. On 18 September in a conversation with Miss Butland, Mr Romano was told that Mr Gorman 'was going to buy it' for $3,200,000. He had proposed a period between contract and settlement of three years to allow development approvals to be obtained. Mr Romano told Miss Butland that he would offer the Finchs $3,250,000 and reduce the period from contract to settlement to two years. The same day he telephoned Mr James Finch and repeated his offer, and also offered to pay Miss Butland $10,000 because she had reduced the amount of commission to be charged on the sale because the vendors were family.

[14] On 21 September Mr Romano consulted his solicitor, Mr Crimmins, who advised him that the contract of purchase should take the form of a put and call option, the effect of which would be an option to purchase given to Todrell which could be obliged to exercise the option and execute a contract of purchase. The period allowed for the exercise of option would be two years and on its exercise Todrell would execute a standard form of contract for the purchase of the lots. The advantage of this form of contract was that it deferred the payment of stamp duty until contracts were signed on the exercise of the option.

[15] On 27 September Mr Crimmins sent Mr Williams draft 'call and put option agreements', one for Lot 1 and one for Lots 27 and 28. The draft for Lot 1 designated Mrs Helen Finch the grantor and Todrell grantee. Mrs Finch was, of course, dead though her name remained on the title as proprietor of Lot 1. This error was later corrected. By cl 1.1 'the call option period' was defined to be the period 'commencing on the date of this deed and expiring at 5.00 pm on that day which is 24 months from the date of this deed.' The 'call option fee' was the sum of $10. 'Contract' was defined to mean the document annexed to the option agreement. The 'land' was defined. The purchase price was $2,650,000 for Lot 1. A 'security deposit' in the sum of $45,000 was to be paid on execution of the option agreement and on the exercise of the option would comprise the deposit 'under the contract in reduction of the purchase price.'

[16] The call and put option agreement with respect to Lots 27 and 28 identified the Finchs as the grantors. The purchase price was $600,000 and the security deposit was $10,000. The other terms were identical.

[17] The relevant clauses provided:

> '2. Grant of call option
>
> In consideration of the payment of the call option fee by the grantee to the grantor (the receipt of which is acknowledged), the grantor hereby grants to the grantee an option, on the terms set out in this agreement, for the grantee to purchase the land for the purchase price and on the terms set out in the contract. The call option will take effect as an irrevocable offer which will lapse on expiry of the call option period.
>
> 4. Exercise of option
>
> 4.1 If the grantee wishes to exercise the call option, then during the call option period the grantee must deliver to the grantor's solicitors:
>
> (a) a notice of exercise of option in the form … in annexure A … properly … executed …
>
> (b) the contract properly executed by the grantee (as purchaser)
>
> (c) …
>
> 5. Binding agreement
>
> 5.1 If the grantee properly exercises the call option, then:
>
> (a) the contract is binding on the grantor and the grantee …
>
> (b) the grantee authorises the grantor to, and the grantor must date the contract with the date of

> which the grantor … receives the items set out in clause 4.1
>
> (c) …
>
> 6. Grant of put option
>
> In consideration of the payment of the put option fee by the grantor to the grantee (receipt of which is acknowledged) the grantee hereby grants to the grantor an option, on the terms set out in this agreement, for the grantor to sell the land to the grantee for the purchase price and on the terms set out in the contract. Such put option will take effect as an irrevocable offer by the grantee to buy the land which will lapse on expiry of the put option period.
>
> 7. Duration of put option
>
> The put option may be exercised at any time during the put option period, but it may not be exercised if the call option has been properly exercised.
>
> 12. Right to assign
>
> The grantor expressly acknowledges and agrees that the grantee shall be entitled to sign its interest under this agreement to a third party … and the grantor shall not object to any such assignment … .
>
> 15. Security
>
> 15.1 By way of security for the performance of the grantee's obligations under this agreement and under the contract, the grantee will provide or cause to be provided a cash security bond … of $45,000 payable on execution of this agreement.'

[18] A contract for the purchase of the land in the standard form approved by the REIQ and the Queensland Law Society was annexed to each option agreement.

[19] For the sake of completeness only I should mention that later on 27 September Mr Crimmins sent Mr Williams 'an additional special condition 1 which (Todrell) requires inserted into the option agreements and contract'. The special condition obliged the Finchs to assist Todrell to obtain development approval and to permit it to go on the land for any purpose necessarily incidental to obtaining approval.

[20] On 28 September Mr Crimmins sent Mr Williams a letter by facsimile transmission:

> 'As discussed, I confirm that the settlement in each contract should be amended to read the date which is two years from the date of execution of the … agreement. For example, if the agreements are

> signed tomorrow, then the settlement date in each … should be … 29 September 2008.'

On the same day Mr Williams informed Mr Crimmins of the error appearing on the title and that the grantor in the option agreement in respect of Lot 1 should be amended to make the Finchs the grantors.

Nothing turns on these exchanges. On 29 September 2006 Mr Crimmins, having made the amendments and additions, sent Mr Williams a further complete set of the option agreements and attachments.

[21] On 29 September 2006 Ms Butland telephoned Mr Romano and asked him to attend Mr Williams' office where the Finchs would be present and the option agreements would be signed. Mr Romano did attend, though he was late. The others present were the Finchs, Ms Butland and Mr Williams. Ms Butland was excluded from the meeting before it turned to the discussion of serious business. Mr Romano's account of the meeting was this (T40.30-T40.50):

> '… Williams said … "We can't go ahead … today because you are not represented". And I asked him what he meant. He said "Well, I know you have been represented by Jim Crimmins, but he is not here." And I said "Well I have only … come to sign contracts … I don't … need him here." And then he said … "… my clients … require that you give a personal guarantee". … You know, there is a lot of shonky builders around." And I took exception … and … said "… Well I've driven up from the Gold Coast to do this … and … now you're telling me I've got to sign a personal guarantee. Why wasn't it in the contract beforehand? …" '

The meeting ended without the option agreement being signed. The absence of a guarantee was 'the only issue … of any significance …'.

[22] Mr Romano remained firm in his refusal to make himself personally liable for Todrell's performance. The Finchs remained equally adamant. On 5 October Mr Williams emailed Mr Crimmins that the Finchs 'do not propose to continue with' the proposed sale.

[23] Nothing of significance turns on the meeting of 29 September but because there is a dispute about the making of the agreement between Todrell and the Finchs which depends upon findings of credit it is appropriate to set out what the other witnesses said about the meeting.

[24] Miss Finch's account was (T164.55-T165.20):

> 'Mr Williams mentioned to Mr Romano that his company … was a $2 company and … Peter Williams was asking him to provide a personal guarantee. … Mr Romano … said he's never given a personal guarantee in his life and he was very disappointed that … the Finchs were expecting a guarantee as he had known the family for 35 years. … Mr Williams … said if the Finchs were to proceed with the contract … Mr Romano could transfer the contract to someone else and a settlement may not be finalised.'

Miss Finch had been advised that the contract 'was something called a put and call' but she 'didn't have any idea what it was.' She was asked if there were any discussions about the terms of the contract, and replied (T165.30-T165.40):

> 'The contract was made up as two years and nine months and Peter Williams said that was far too long … as family members … who were beneficiaries, several of them were on the pensions and it would take a long time for the money to come.'

She also said (T165.50):

> 'The meeting ended up with Mr Romano refusing to give a guarantee … and … that was the end of the matter.'

[25] James Finch's account of the meeting is not materially different.

[26] Mr Williams' evidence of the conversation at his office on 29 September 2006 are to the same effect as the other witnesses'. He remembered that he told Mr Romano that he could not give him any advice or 'make any comment as to what he should or should not do' because he knew Mr Romano had his own solicitor. He 'then indicated to the conference room and the people at large that he would be talking to (his) clients as to what (his) advice would be …'. His first concern was that the contract did not provide for a personal guarantee of the directors and that Todrell might be insubstantial. Mr Romano accepted the correctness of his guess about Todrell's financial position. Mr Williams went on to say that he was concerned the contract allowed for an assignment by Todrell. The assignee may be unable or unwilling to complete the purchase of the three lots. That eventuality might occur, he thought, at the end of the option period so that the Finchs would have wasted two years. The meeting concluded on the basis that the contracts would not be signed and Mr Williams would speak to Mr Crimmins.

[27] Mr Williams made a file note of the meeting shortly afterwards. It became exhibit 6a and corroborates his testimony. Mr Williams made another file note of the meeting about six months later. It became exhibit 8 and is more detailed and not entirely consistent with the earlier, contemporaneous, note. Mr Williams described it as 'an extra explanation' of the meeting.

[28] On 27 October 2006 Mr Romano telephoned Mr James Finch to ask what was happening about the sale of the lots. Mr Finch replied that he and his sister had reached agreement with Croydon and had an appointment with their solicitor at 5 o'clock that day to sign contracts of sale. He said that Mr Gorman had offered $3,215,000 apportioned as to $2,600,000 for Lot 1 and $615,000 for Lots 27 and 28. Mr Romano pointed out that he had offered more but Mr Finch said that Mr Gorman had told him that Mr Romano's companies were in serious financial difficulty and 'that's why [he] couldn't give a guarantee.' Mr Romano denied the imputation.

[29] He was leaving that night to fly to Singapore where he planned to stay for a few days on business. He told Mr Finch that he wanted to meet with him and Miss Finch urgently to 'see if we can do a deal …'. He went almost immediately to Miss Finch's house where she and Mr Finch were waiting. Mr Romano's account of the meeting was (T42.28-T42.46):

> 'I asked her what was going on … and … why didn't you contact me and she reiterated … what Jimmy told me … that Danny said … I had a severe cash flow problem … and … that I was supposed to buy this property and then sell it to Danny Gorman … for $50,000 …'

Mr Romano denied having such plans and said (T42.53-T43.18):

> 'We can do a deal on this. I am going overseas tonight and I want to put this to bed today, once and for all … . Then we went on to discuss things. … I said that … I'd be prepared to … go from $2.6 (for Lot 1) and $650,000 for the other (lots) and … I asked … who's got the authority to do this and Jim and Chrissy said "We have" … and … I said "… I will increase the deposit by another $10,000 which makes it up to $65,000 instead of $55,000" … and then we … spoke about having the option of 15 months plus … three months – 3 x 3 x 3 so I was happy to do that …'.

[30] He was asked to explain this last answer and said that the agreement was that the option period would be reduced to 15 months but with the grantee having a right to extend it on three occasions for 90 days each. The effect was that the option period could not exceed two years and might be less, if development approval were obtained earlier.

[31] Discussion then turned to the guarantee and Mr Romano said (T43.23-T43.33):

> '… I'm not worried about the guarantee. You let your solicitor prepare the guarantee and I'll just sign it ... . We agreed on that and then I … said "… If you are happy to do this … we can do a deal now …". And they said "Yes we are happy with that" and … we actually shook hands on it. I said "I am going away tonight and it is imperative for me to get this done because I will be away for about five days".'

[32] Mr Romano said that he telephoned Mr Crimmins on his mobile phone which he turned to speaker mode. He told Mr Crimmins that he was with the Finchs and he 'explained the situation'. He told Mr Crimmins about the agreed increase to the amount of the deposit, and that he would provide a guarantee as earlier requested, and that the Finch's solicitor would prepare the guarantee. He said that the price would be $2,600,000 for Lot 1 and $650,000 for the other two lots.

[33] Mr Romano asked Mr Crimmis to prepare amended agreements and send them to Mr Williams. Mr Crimmins explained that he had no secretary at the time and could not prepare the amended option agreements that day but said he would contact Mr Williams to discuss things. He asked whether 'everybody [was] happy with the deal' and all replied affirmatively. Mr Crimmins advised that 'to lock the deal in' there must be 'a deposit cheque and … a receipt.'

[34] Mr Romano did not live far from Miss Finch. He asked her and her brother to come to his house in order to provide them with a cheque for the deposit moneys. Miss Finch said that she would 'organise' the receipt and indeed she found an old receipt book for the purpose. Miss Finch said that she would take the cheque to her solicitor but 'now

that they've done a deal with [Romano] they didn't want to see … Danny Gorman.' They wanted to leave Mr Williams' office before Mr Gorman arrived.

[35] Mr Romano left and went to his home. Not long after the Finchs arrived. There was some difficulty finding a cheque book which operated an account with sufficient funds to pay the deposit. Todrell had recently been in incorporated and had no bank account. Eventually a cheque book was found for Sunstone Traders Pty Ltd and Mr Romano wrote out and signed a cheque in favour of 'Williams Lawyers Trust Account' for $65,000 which he gave to Miss Finch who wrote a receipt. It is in these terms:

> '*Sunstone Traders* 27-10-06
> *Pty Ltd*
> Received from *Bap Romano*
> The sum of *sixty five thousand*
> *dollars* being for *deposit on*
> *land sale at 22 and 24 Highview Terrace and 19 Greenhill Grove*
> *$65,000*'

Miss Finch signed the receipt.

[36] Mr James Finch expressed considerable joy that 'we had done the deal'.

[37] Mr Romano added a detail in cross-examination. He said he did not have his reading glasses with him and asked Miss Finch to read aloud what she had written on the receipt, and she did so. The Finchs then left.

[38] Later in the afternoon Mr Romano received a telephone call from Mr Williams who told him that he was with the Finchs. Mr Williams said that they had told him they had 'done a deal with' Mr Romano and asked whether he would give a personal guarantee. He said he would. Mr Williams then said he would telephone Mr Crimmins. Later that afternoon Mr James Finch telephoned Mr Romano to tell him they had left Mr Williams' office before Mr Gorman had arrived and he repeated that he was 'happy that we'd done the deal.'

[39] The happiness did not last long. Later that evening Mr Finch rang again. He told Mr Romano 'that the deal with Danny Gorman was back on … for $3.4 million.' Mr Romano remonstrated with Mr Finch who made no reply.

[40] Mr Romano flew to Singapore that evening but next day telephoned both Mr Finch and Miss Finch. The essence of the conversations was the same. He said to them (T49.50-T49.51) 'You can't do this. We made a deal. … You can't sell it to anyone else.' He asked Miss Finch not to do anything until he returned to Brisbane. When he returned on 1 November he went to Miss Finch's house. Mr Finch was there as well. There was a conversation in similar terms to that which had occurred on the telephone. Ms Finch asked Mr Romano if he would match Mr Gorman's price and Mr Romano refused. There was another equally unproductive meeting the next day, 2 November. Mr Romano made another attempt on 6 November. He spoke to Miss Finch who asked him again whether he would offer the same price as Mr Gorman had. Mr Romano again refused.

[41] Mr Crimmins confirmed that his secretary left early on the afternoon of 27 October 2006. It was a Friday. He also confirmed that he received a telephone call from Mr Romano in which he could hear other voices. Mr Romano said to him that he

had reached agreement with the Finchs and instructed him to contact Mr Williams 'to organise … the documents to be sent out and signed.' Mr Romano said he would give his personal guarantee.

[42] Following that conversation Mr Crimmins telephoned Mr Williams. He made a brief note of what was said. He told Mr Williams that Mr Romano had said he and the Finchs had reached agreement and he discussed the details. He said that the term of the call option period was to be 15 months 'plus three plus three plus three', and the purchase price was to be $650,000 on one contract and $2,600,000 on the other. A deposit of $45,000 was payable on the larger contract sum and a deposit of $20,000 on the contract for $650,000. He also said that Mr Romano would sign a personal guarantee. Mr Crimmins advised Mr Williams that he could not send the documents that afternoon because his secretary had left. He said he would send them the following week. Mr Williams said he would prepare the personal guarantee and send it to Mr Crimmins.

[43] On Tuesday 31 October 2006 Mr Crimmins sent to Mr Williams the amended Put and Call Option Agreements 'containing the agreed changes'. He asked Mr Williams to 'attach to the contract the personal guarantees you require to be signed' by Mr Romano. On 6 November Mr Williams sent Mr Crimmins the 'guarantee and indemnity which is proposed' Mr Romano should execute. On 6 November Mr Romano executed the option agreements and the guarantee. They were sent by courier to Mr Williams on 7 November 2006. The Finchs declined to execute the option agreements and on 29 November returned the Sunstone Traders cheque. On 17 November Todrell lodged caveats in the Queensland Land Registry forbidding the registration of any instrument affecting Lots 1, 27 and 28. The interest claimed was an equitable interest as the holder on an option to purchase the lots 'pursuant to a partly written Put and Call Option Agreement made … in or about October 2006 …'.

[44] As already mentioned on 8 November 2006 the Finchs executed contracts for the sale of the three lots to Croydon.

[45] It is necessary to return to the meeting of 27 October and to consider the accounts of it given by the Finchs.

[46] Miss Finch remembered that it commenced at 2.00 pm. After initial pleasantries Mr Romano said 'Don't you trust me?' Miss Finch replied 'I don't trust any one where money is involved.' After some further discussion Mr Romano asked Mr Finch to leave the room. He obliged and when alone Mr Romano told Miss Finch that 'her family were ripping (her) off and (she) should be paid more for her property.'

[47] The reference was apparently to the apportionment of the purchase price between Lot 1 which is held for the benefit of the late Mrs Finch's estate, and Lots 27 and 28 which were the Finchs' own. Of course any reduction in the price for Lot 1 to augment the price for the other lots would involve Miss Finch in an actual or potential breach of fiduciary duty. It is uncontroversial that she wanted a higher price for her house property than it was worth.

[48] To return to the narrative, Miss Finch said that she answered Mr Romano (T168.4):

> '… it wasn't my family. People can make offers for the property and we would deal with that afterwards.'

[49] Miss Finch claims this conversation took about 15 minutes after which Mr Finch rejoined them. When he did Mr Romano offered to pay $650,000 for Lots 27 and 28 and $2,600,000 for Lot 1. Miss Finch then said that the Finchs would only agree to 'a two year maximum settlement'. Mr Romano agreed. It was a 'straight two years', to 'come up as 15 months and three extensions of three months each.' Miss Finch could not recall any discussion about a guarantee to be given by Mr Romano but is definite that nothing was said about Mr Williams drafting a guarantee for Mr Romano to sign. Miss Finch said to Mr Romano that if he 'was interested in purchasing the properties he would need to get documents faxed through that afternoon' to Mr Williams. She explained that she had a meeting late that afternoon and she 'knew the documents (i.e. Croydon's contract) were there so they (i.e. Todrell's contract) could be discussed also with Mr Williams.' Mr Romano proposed a deposit of $65,000 which was accepted.

[50] Miss Finch agrees that she and her brother left to follow Mr Romano to his home to receive the deposit cheque and he said he would want a receipt. She reminded Mr Romano that 'he needed to get those contracts through as soon as possible to Mr Williams' office.' She denies that there was any telephonic communication between Mr Romano and Mr Crimmins while they were at Highview Terrace. She also denies any expressions of relief or satisfaction that a deal had been done, and that Mr Romano shook hands or embraced either her or her brother. She accepts Mr Romano's account of the search for a cheque book on an account with sufficient funds to support the deposit and says there was a discussion about the payee to be written on the cheque form. Together they came up with 'the trust account of Mr Williams'. Miss Finch then wrote out the receipt. She asked what should be written but getting no reply, chose her own words. She denies reading the receipt aloud. About this time Mr Romano said he would telephone his solicitor which he did. He utilised the speaker mode. He said to Mr Crimmins (although Miss Finch did not know the solicitor's identity) that the Finchs were present with him. He then 'used some very angry abusive and even foul language at this man and told him if he'd got the contracts right the first time we wouldn't be going through it again.' Miss Finch heard nothing said in reply. She was 'shocked'. Shortly after she and Mr Lynch left and went to Mr Williams' office in Coorparoo arriving at about 4.30 pm.

[51] The Finchs arrived at Mr Williams' office at about 4.30 pm. They handed over the cheque and had a conversation with Mr Williams the details of which Miss Finch professed not to recall. They left at 5.07 pm, before Mr Gorman arrived, leaving Mr Williams to 'deal with' that gentleman. Miss Finch had a number of explanations for their abrupt departure. One was that Mr Gorman 'hadn't turned up' and Mr Romano's contract 'hadn't turned up' so she and her brother 'just left'. Another explanation was that 'it was Friday night, heavy traffic and (Mr Finch) was not used to driving … at night because of failing eyesight'. Miss Finch denied the suggestion they did not wait for Mr Gorman because they had made a commitment to Mr Romano. Her answer was, however, equivocal. She said 'I don't believe we totally committed ourselves to Mr Romano.'

[52] Miss Finch agrees she spoke by telephone to Mr Romano when the latter was in Singapore. Her account of the conversation does not differ materially from Mr Romano's.

[53] Mr Finch's recollection of the meeting of 27 October is similar to his sister's. He, too, recalls Mr Romano's opening remark to be 'Don't you trust me?' to which Miss Finch replied 'I don't trust anyone where money is concerned.' They then had 'a bit of a

chat' during which Mr Finch was asked to leave the house. He obligingly went out having been told that Mr Romano wanted a private discussion with Miss Finch. He stood at the front of the house and spoke by a mobile phone to a woman friend. While he was so engaged Mr Romano approached him and accused him of speaking to Marie Butland and said 'I told you not to call Marie Butland'. Mr Finch good naturedly took no offence at this appalling rudeness and he explained to Mr Romano to whom it was that he was speaking. He was invited to return to the meeting and did so. They discussed the duration of the contract period and 'ended up deciding on a two year overall contract. … a 15 month contract with three three month extensions.' He remembered some discussion about price and apportionment between the three properties but could not recall any detail. Mr Finch thought that there was no telephone conversation between Mr Romano and Mr Crimmins when they were at Highview Terrace though he recalls such a conversation from Mr Romano's house. He could not be 'sure one way or another' whether they discussed the question of the guarantee. He denied any discussion of Mr Williams drafting a guarantee and sending it to Mr Romano's solicitor for execution. He did, though, remember that Miss Finch asked Mr Romano to have his solicitor send the option agreements to Mr Williams that evening.

[54] Mr Finch denies expressing joy at having reached agreement with Mr Romano for the sale of the land and cannot recall shaking hands though he does recall saying to Mr Romano that he would prefer him to be the developer rather than Mr Gorman whom he did not know. Mr Finch's account of the production of the cheque book does not differ from the others. His recollection was that Mr Romano nominated that amount of $65,000 and he, Mr Finch acquiesced. When Mr Romano asked Miss Finch for a receipt he protested mildly that it was not 'necessary with a cheque' but his interjection was ignored and he 'just let' his sister write it out. He 'never looked at it' and does not recall her reading it out, though 'she may have done'.

[55] Mr Finch's recollection of the telephone call between Mr Romano and Mr Crimmins was that it occurred on a mobile phone on speaker mode 'so (they) could all hear.' He heard Mr Romano speak 'in a rather rough … voice … using some language … fs and bs and things like that … sort of bawled him out a bit. … he was saying that had he done the contracts properly the first time that we wouldn't be here doing them again …'. Mr Finch could not hear anything Mr Crimmins said in response.

[56] Just before they left Mr Finch said 'looks like we may have sold the land'. The Finchs then left and went to Mr Williams' office. All Mr Finch could remember of the conversation with their solicitor was that he was told 'contracts should be coming through …'. Indeed the Finchs had expected them to precede their arrival.

[57] In cross-examination Mr Finch confirmed that he and his sister left Mr Williams' office before Mr Gorman arrived. They did not consider waiting for him to arrive because they were 'a bit embarrassed that coming in with a cheque from Mr Romano'. He admitted that their appointment with Mr Williams was for the purpose of signing contracts of purchase and sale with Croydon. The best explanation Mr Finch could offer for not signing those contracts, or speaking to Mr Gorman about Mr Romano's improved offer was this:

> 'Well, talking with Mr Romano and having discussions we had with him and then said that we would … be considering his offer before we signed with Mr – we asked us not to do that … we gave him that

> much and we went there and we just didn't sign with Mr Gorman because we were going to give him (Romano) a chance to prove himself.'

[58] His explanation for signing the contract with Croydon ten days later, on 8 November, that Mr Romano's contracts 'didn't even turn up …. We waited … till the 7th and decided … it obviously is not coming, so we signed with Mr Gorman.'

[59] It will be remembered that Mr Crimmins had sent the contracts to Mr Williams on 31 October.

[60] It should also be noted that Mr Crimmins denied that Mr Romano had even spoken to him rudely or critically, and did not so on 27 October 2006.

[61] Mr Williams confirmed that he spoke to the Finchs on 27 October 2006, after which he telephoned Mr Romano. After establishing Mr Crimmins knew and approved of the conversation, Mr Romano said he was 'going to buy the properties for $3,250,000' and that he had given a cheque to Christine Finch for $65,000 for a deposit. Mr Romano asked Mr Williams to speak to Mr Crimmins 'to put together the contracts with a personal guarantee from Mr Romano.' Mr Williams then spoke to Mr Crimmins who said he would send the contract documents to Mr Williams the following Monday.

[62] When Mr Gorman arrived Mr Williams told him that 'the Finchs were looking at a contract with someone else … anticipated to be finalised shortly.'

[63] There was a most disturbing aspect to Mr Williams' evidence. He made a diary note of his conversation with the Finchs on 27 October 2006. The document became exhibit 6b. It reads:

> '… they advised that they are going … ahead with dealing about Romano …. Then had a conference call with about Bap Romano on his mobile as he is leaving for Singapore and Bap said that he had spoken to Jim Crimmins and he said that it's OK for him to talk to me.
>
> He said that he is going to buy the property for $M3.25 and he has given Christine a cheque for $65,000 being the deposit.
>
> Furthermore, he asked me to contact Jim Crimmins because Jim will put the contracts together together with a personal guarantee by Bap Romano.
>
> Rang Jim Crimmin and discussed the matter with him. He said that those are his instructions and he will get me the documentation on Monday.
>
> I had a further discussion with Jim and Chris Finch to finalise this matter and they were quite happy to go ahead with Bap Romano after giving it serious thought.'

[64] A critical issue in the litigation is whether the Finchs and Mr Romano reached a final agreement for the sale and purchase of the three lots when they spoke on the afternoon

of 27 October 2006. Mr Williams' diary note, exhibit 6b, is significant corroboration of Mr Romano's evidence that the parties had struck an agreement. This important diary note was not disclosed by Mr Williams. His firm acted for the Finchs until about a month before the trial. The omission is obviously serious. More serious is the fact that another diary note of the 27 October meeting between Mr Williams and his clients, was disclosed. On its face it purports to be a contemporaneous note but in fact it was not brought into existence until March or April 2007. This diary note suggests a very different type of conversation. It became exhibit 9 and reads:

> '… I rang Bap Romano with the clients in the room ….
>
> I indicated to him that I had my clients with me … and that they had had discussions with him earlier that day in relation to his offer and I indicated to him that we required a director's guarantee. He replied that would be fine ….
>
> I further informed Romano that I wanted to see the offer in its full form so that I could get instructions from my client.
>
> He asked me to ring his solicitor to arrange to get the documents sent to us. At that stage he said that he expected the documents would be already with us and I advised him that we had not received anything.
>
> Rang Jim Crimmin and he said that he had received instructions … and that he wanted us to utilise the old documents. I told him that I was not prepared to utilise the old documents, I wanted to see the new offer in full with all the documents together. He said that he would send it to me.'

[65] According to Mr Williams' authentic diary note his clients told him on 27 October that they were 'going ahead' with the sale of the lots to Mr Romano and they had given the matter 'serious thought'. It also records that when he spoke to Mr Romano on the telephone the latter volunteered that he would guarantee Todrell's obligations. It also shows that Mr Crimmins told him, in their telephone conversation, that he would send the contract documents on the following Monday.

[66] The later diary note, which was deceptively described in the Finchs' list of document as one of 27 October 2006 despite its much later provenance, completely omits the Finchs' expressions of commitment to Mr Romano and Todrell. On three occasions the diary note refers to Mr Romano's 'offer'. It reports that Mr Williams asked about the guarantee despite the fact that the authentic diary note reveals that it was Mr Romano who told him that he was giving a guarantee. It was not something Mr Williams had to elicit.

[67] The guarantee had been a subject of discussion between Mr Romano and the Finchs that afternoon. Mr Romano's refusal to give a guarantee earlier had been the cause of the break down in negotiations. His yielding on that point was what made agreement impossible. It is not credible that the Finchs did not tell Mr Williams that when they met.

[68] The later diary note appears to contain two fabrications. The first is that Mr Romano is recorded as having said that he expected Mr Crimmins would already have sent the

contract documents to Mr Williams. It is obvious that Mr Romano could have expected no such thing: he had been told that Mr Crimmins had no secretary that afternoon and could not prepare documents. Mr Crimmins corroborates that and there is no reason to doubt his evidence. The second fabrication is that of the conversation recorded in the last paragraph. This finds no support in Mr Crimmins' evidence and given the ease with which electronically created documents can be amended it seems most implausible.

[69] No satisfactory information was given for the substitution of the later, inaccurate, diary note for the contemporaneous note damaging to the Finchs' case in the process of disclosure of documents. No explanation was offered for the concealment, or omission, of the authentic diary note until its tender on the third day of the trial. It was, to say the least, misleading to produce only the later diary note and to describe it as one of 27 October 2006.

[70] The consequence of these circumstances is that I place no reliance upon Mr Williams' evidence. I reject it utterly where it conflicts with Mr Crimmins' evidence. It causes me to look askance at the testimony of the Finchs.

[71] Many more conversations than the ones I have rehearsed were canvassed in evidence in chief and cross-examination. The excursion was justified on the basis that questions went to credit. Inconsistencies and contradictions were sought to bolster respective arguments for the acceptance of Mr Romano's evidence on the one hand, or the Finchs on the other. The parties have been sedulous in their attention to the detail of what was said and not said, what was written and not written. I do not, of course, criticise counsel for their industry or application to their clients' causes. I intend no disrespect to their arguments if I limit my reasons to the salient points which convince me to accept the substance of what Mr Romano said. Before passing to those points I should mention that both Mr Romano and Miss Finch, and to a lesser extent Mr Finch, exaggerated and adorned their evidence in an endeavour to make it more plausible. Nevertheless, as I said, the essence of Mr Romano's evidence is acceptable, and the Finchs' is not.

[72] The first difficulty in accepting the Finchs' evidence is that they said they expected the contract document to be emailed to Mr Williams' office by the time they arrived. This expectation also appears in exhibit 9 which I have rejected as inaccurate. The diary note appears to have tainted the Finchs' evidence. There is no doubt that Mr Crimmins spoke to Mr Romano when he was with the Finchs on the afternoon of 27 October 2006. There is not doubt they spoke about the Put and Call Option Agreements. Mr Crimmins did not say, and could not have said, that he would send amended documents to Mr Williams that afternoon. He had no secretary to prepare them. There is no reason to doubt his evidence that he told Mr Romano that. The Finchs must have known it too. Yet Miss Finch was prepared to advance a false case, seeking corroboration in her solicitor's note.

[73] It is equally difficult to accept the Finchs' evidence that they could not recall whether the question of a guarantee was discussed when they met Mr Romano. It must have been the most important question to be addressed. His refusal to give a guarantee had been the cause of negotiations ceasing a month earlier. It was obvious that Todrell could not buy the land unless Mr Romano gave his guarantee. Clearly he did agree to give it. That is recorded in the diary notes. The fact that he had given it was the only reason the Finchs were prepared to discuss other terms and express their commitment

to 'going ahead' with Todrell. The Finchs' refusal to admit the point is not genuine. It was, in my opinion, offered to bolster their evidence that they had not reached agreement when they met Mr Romano.

[74] Another point is that the Finchs came close to admitting that they had committed themselves orally to sell the land to Todrell. I have quoted their remarks earlier in para 51 and 57 of these reasons.

[75] Moreover their embarrassment at meeting Mr Gorman at Mr Williams' office and their haste in leaving it to avoid him is inexplicable unless they had committed themselves to sell to Todrell. They had arranged to meet Mr Gorman to sign contracts to sell to Croydon. They would, of course, felt some embarrassment in having to tell them they had changed their minds and had agreed to sell to Todrell. There was no such embarrassment if their had simply decided to defer signing with Croydon to consider a slightly better offer from Todrell.

[76] It is significant that when Mr Crimmins spoke to Mr Williams he asserted that the parties had reached agreement and knew the precise terms of it, which he relayed to Mr Williams. Mr Crimmins' knowledge can only have come from the conversation with Mr Romano on speaker phone. The Finchs must have stood by and heard Mr Romano tell Mr Crimmins that they had reached agreement, and listened while the details of it were given by Mr Romano. They did not contradict him.

[77] The Finchs' account of that conversation is irreconcilable with Mr Crimmins'. Although he cannot recall much detail of it he was adamant that there was no occasion when Mr Romano spoke rudely to him, swore at him, or was critical of him. There is no reason not to accept Mr Crimmins' evidence.

[78] Mr Williams' diary note made shortly after the 27 October meeting with his clients is strongly cooperative of Mr Romano's version of events. It is deeply suspicious that the note was suppressed and replaced by a very different one which was produced in misleading circumstances.

[79] It is also suspicious that the Finchs professed not to remember what they said to Mr Williams when they went to his office after leaving Mr Romano. They remembered much detail of many other conversations. Yet if what Mr Williams' recorded is true, as I accept it is, the Finchs would have good reason not to wish to reveal that in evidence.

[80] Lastly the Finchs' account of the meeting was in some respects implausible. It is most unlikely to have commenced as the Finchs described. Mr Romano is supposed to have said something similar, 'Don't you trust me', after the September meeting, when he had refused to give a guarantee. But on 27 October he went prepared to guarantee Todrell. There was no longer a question of trust. There was to be a legal obligation.

[81] I do not accept the testimony that Mr Romano rudely insisted that Mr Finch should leave the meeting while he spoke privately to Miss Finch. Mr Romano did not strike me as being of particularly assertive character. Miss Finch is a lady of some shrewdness and strength of character. I think it most unlikely she would have tolerated a lecture from Mr Romano about her own affairs and her obligations to her siblings. Her account of what she said in response is nonsensical.

[82] It is equally unlikely that Mr Finch would submit so meekly to the preposterous rudeness he describes in Mr Romano. It was none of Mr Romano's business who Mr Finch was speaking to on the telephone, and I have no doubt Mr Finch would have so replied. The reported conversation is improbable. 'I told you not to ring Marie Butland', is what Mr Romano is supposed to have said. But there is no evidence that the had issued that injunction so the remark has no genesis. In any event Mr Romano could not control to whom Mr Finch would speak and I do not accept that he tried.

[83] There are additional reasons why Mr Finch's evidence cannot be accepted. He testified that on the evening of 27 October when he spoke to Mr Romano by telephone about Croydon's increased offer, Mr Romano said that he was at home having missed his flight to Singapore. That did not happen and Mr Romano would not have said it did. Additionally Mr Finch advanced as the reason for signing Croydon's contracts that Todrell, or Mr Crimmins, was tardy in getting Mr Romano's guarantee to them. He said:

> 'We were getting tired of waiting for it so we went the other way. We thought it wasn't coming at all.'

Some delay was occasioned by Mr Williams not attending to the drafting. The agreement was that Mr Romano would sign a guarantee in the form prepared by the Finchs' solicitors. In any event it was signed by Mr Romano and sent to Mr Williams on 6 November, before the Finchs signed Croydon's contracts. His sister made it very clear that the reason they did not sign the option agreements with Todrell was that Mr Romano would not match Croydon's increased price.

[84] The conclusion that follows from accepting Mr Romano's evidence is that he, Miss Finch and Mr Finch reached agreement on all material terms for the sale of the three lots on the afternoon of 27 October 2006. The framework of the agreement had been discussed earlier on 29 September. There were to be Put and Call Options on the terms that were then acceptable save for the lack of a guarantee. That was offered and accepted on 27 October, as was an increase in the amount of the deposit and an agreed apportionment between Lot 1 and Lots 27 and 28. There was also agreement on a shortened option period.

[85] Counsel for the Finchs and for Croydon take the point that, if I should find there was a concluded agreement, it is made unenforceable by s 59 of the *Property Law Act* 1974 (Qld). The section provides:

> 'No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note of the contract, is in writing, and signed by the party to be charged, or by some person by the party lawfully authorised.'

[86] It is, I think, clear that s 59 applies to an option for the sale of land. See *Mainline Investments Pty Ltd v Davlon Pty Ltd* (1969) 2 NSWR 392 at 398-9 and *McBride v Sandland* (1918) 25 CLR 69 at 76-77 and 95.

[87] It was argued for the Finchs and Croydon that Todrell had not proved that Ms Finch had been authorised by her brother to sign the receipt. I reject this submission. On

Mr Romano's account of the meeting of 27 October, which I accept, the Finchs agreed then and there to become parties to the option agreements with the changes they had discussed that afternoon. Having taken brief advice from Mr Crimmins the three of them set about creating what was thought to be a binding written record of the agreement. The payment of a deposit and a receipt was thought to be sufficient. Ms Finch, in her brother's presence, sat down to write it out. There is no doubt that Mr Finch knew what she was doing. There was some discussion about what she should write. Miss Finch asked for some assistance in that regard but says she got none. Mr Romano said she read the receipt out aloud after she had completed the composition. I am not satisfied that the recitation occurred but I am satisfied that Mr Finch knew his sister was writing a receipt as a means of indicating their assent to the agreement he had made with Mr Romano. By his conduct he authorised her to sign the receipt on his behalf.

[88] To be a sufficient memorandum of the agreement the receipt had to describe the parties to the contract, the land the subject of agreement, the price, and all essential terms. Now it is clear that the receipt does not meet these requirements. It does not identify the parties. The purchaser, or more particularly the optionee, was Todrell but the receipt refers to Sunstone Traders Pty Ltd and Mr Romano. Likewise there is no reference to Mr Finch as one of the vendors or optionors. Nor is there any reference to the price. The provision of a guarantee, which was of critical importance to the Finchs, is not mentioned. Its omission by itself makes the memorandum insufficient. See *Gray v Smith* (1889) 43 Ch D 208 at 219-220 and *Hawkins v Price* [1947] Ch 645. Additionally the receipt refers to the sale of land while the agreement Todrell seeks to enforce is an option for the purchase and sale of the land.

[89] Counsel for Todrell did not assert that the receipt is a sufficient memorandum. Mr Bell QC's argument is that the option agreements and the guarantee documents sent to Mr Williams on 6 November 2006 may be looked at together with the receipt to form the memorandum. There is no doubt that the later documents contain all the terms agreed to on 27 October.

[90] A common formulation of the principle is that given by Russell J in *Stokes v Whicher* [1920] 1 Ch 411 at 418:

> "… if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms and writing, then you get a sufficient memorandum within the statute by reading the two together."

[91] The principle was expressed this way by Jenkins LJ (with whom Romer and Sellers LJJ agreed) in *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 130:

> '… it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged, which, while not containing itself all the necessary ingredients of the required memorandum, does contain some reference, expressed or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may

> be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum …'.

[92] The receipt refers to another transaction. It describes the money, receipt of which is acknowledged, as a deposit in the context of a sale of land. The sale is 'another transaction'. The authorities allow parol evidence 'to explain the transaction', or to identify any document relating to it. The evidence shows that there was a transaction between Todrell and the Finchs with respect to the land, though it was not a transaction of sale. The evidence identifies the option agreements sent by Mr Crimmins to Mr Williams on 31 October 2006 and the guarantees sent on 6 November. There is, however, a problem. The documents which are identified by parol evidence did not exist when Miss Finch signed the receipt. She had not, of course, seen them and did not know what they contained.

[93] Dr Williams wrote in his work, *The Statute of Frauds*:

> 'It is suggested (though with much hesitation) that the principle of the more modern cases may be stated as follows: if in the signed document there are words, clauses or provisions which require to be explained before they can be properly comprehended by the court, and such explanation necessarily involves a reference to some unsigned document, then, provided that the signatory knew of the existence and the contents of the unsigned documents at the date when he signed the signed document, this unsigned document will be considered to be sufficiently connected with the signed document to enable the two to be read together to form one writing.'

[94] The passage was accepted as correct by Helsham J in *Di Biase v Rezek*, the judgment on appeal being reported at (1971) 1 NSWLR 735. Moffitt JA quoted the passage and Helsham J's acceptance of it (at 747), and went on (748):

> 'It is basic to the passage quoted from Dr Williams and the chapter in which it appears dealing with resort to an unsigned document … that such document is in existence, as it need be to be referred to directly or indirectly in the signed writing so that, at the time the memorandum is authenticated by a signature being appended, this act of authentication by reference extends to the other writing. We have not been referred to, nor am I aware of, any case where unsigned writing, not in existence when the signature was appended to the memorandum, has been regarded as supplementing a deficient memorandum. … It is clear from the "modern cases" referred to by Dr Williams … that it was still considered some reference from the signed to the unsigned document is necessary … although such reference need not be express but can be a matter of inference.'

[95] Counsel for Todrell submitted that the principle has been substantially relaxed and refers to that part of the judgment of Jenkins LJ in *Timmins* which I quoted to support the argument that the option agreements and guarantees are documents which relate to

the transaction agreed upon between Mr Romano and the Finchs, to which the receipt refers, so that the later documents can be identified by parol evidence and read together with the receipt for the purpose of satisfying s 59.

[96] The submission cannot be accepted. Jenkins LJ was doing no more than expanding the expression of principle enunciated by Russell J in *Stokes*. He was not proposing a new, liberal, doctrine. This is clear from the judgment of Romer LJ who, without any apparent apprehension that he was saying anything different, said (133):

> '… (The) argument … was that although two separate documents can together constitute a memorandum for the purposes of s 40, the party to be charged must sign the second of the two; that is to say, if the defendant has signed a document, the plaintiff cannot rely on it in conjunction with a later document signed by himself. This in general must be true. A defendant cannot be bound by a document which he has not signed unless he has in effect incorporated it in the document which he has signed, in which case he would be regarded as having notionally signed both documents; but as he cannot be taken to have incorporated or signed a document which does not exist, the theory is inapplicable except where the defendant has signed the second of two documents on which the plaintiff relies as together constituting a memorandum.'

[97] Romer LJ went on to allow one exception:

> 'If on the same occasion and as part of one and the same transaction … a vendor and purchaser sit down at a table and respectively write out a receipt and a cheque, then assuming that these documents between them sufficiently evidence the terms of the bargain, it would be going too far to say that the vendor could not rely on them as constituting a memorandum if the purchaser signed his cheque a few seconds before the vendor signed the receipt. I think it is enough to say that the documents relied on were brought into being more or less contemporaneously …'.

See also Jenkins LJ at 123.

[98] The only case offered in support of Todrell's submissions is *Lawrence v Fordham* [1922] VLR 705. In that case a written contract for the sale of an orchard included an agreement to purchase, in addition to the land, the 'stock, plant and chattels as per list attached'. When the contract was signed by purchaser and vendor there was no list in existence. Later that same day the list was completed and attached to the contract document. The list was signed by the vendor but not by the purchaser who subsequently refused to complete the sale. Cussen J said (715):

> 'I will assume that … the signature or initials were … (not) placed on the main document at the time the list was prepared, though it may be said that all that was done on the afternoon of the 29th … might fairly be regarded as one transaction. But on the defendant's view of the facts I think a liberal meaning must be given to the words "list attached," and that it would include a list subsequently, but as part of the same transaction, attached. There is no doubt, I think, that

> the defendant must be taken to have assented to this being done, and to have assented to the list in fact prepared as being the list referred to in the main document, and as … the list was … attached … I think there was a sufficient memorandum …'.

[99] This is rather a special case. The decision rests on two grounds:

> (i) That despite the lapse of a few hours the two documents, contract and list, were regarded as coming into existence contemporaneously, as part of 'one transaction'.
>
> (ii) That by his signature the defendant gave his assent to the contents of the list which the parties contemplated would be prepared and physically attached to the contract.

The case is not, in my opinion, authority for any wider proposition that a document not referred to in the signed memorandum, and coming into existence days later, may be incorporated to form part of the signed memorandum.

[100] Counsel for Todrell also relied upon the opinion of Greig and Davis, *The Law of Contract* which is critical of 'the proposition advanced by Williams and so readily accepted by the … judges in … *Di Biase v Rezek* (which) would seem to be too inflexible to deal with the matter which should depend upon the circumstances of a particular case.' (p 701)

[101] The authors concluded their discussion (703):

> 'What could be classified as one transaction depends upon an estimate of what constitutes a normal sequence of events in relation to the particular case. … The outcome should depend upon a consideration of the reasonable expectations of the parties, and not upon a rigid rule of law which takes no account of those expectations.'

[102] I do not myself accept the criticism or the suggested solution. Section 59 is 'a rigid rule of law' which regulates the circumstances in which contracts for the sale of land may be enforced. A party is not to be liable on such a contract unless he has put his signature to a document setting out the terms of the bargain. The logic of Romer LJ cannot be faulted.

[103] Other text writers do not share Greig and Davis' opinion. In Voumard *The Sale of Land* 5th ed para 2220 footnote 131 the author says, relying on *Di Biase*:

> 'The unsigned document may be read together with the signed document only where the signatory knew of the existence and contents of the unsigned document when he appended his signature to the signed document.'

A reading of the judgments in *Timmins* shows that, with the exception in the case of contemporaneity, the document which is to be connected to, and read with, the signed document, to create a sufficient memorandum, must exist at the time of the signature so it can be a document capable of being referred to by the signed document. Jenkins LJ (123)

accepted the correctness of *Turnley v Hartley* (1848) 3 NPC 96 in which Wightman J had said:

> 'To fulfil the requirements of the statute, the memorandum must be such that, at the time of the signature it contains a valid contract. It will not do to complete the contract by the introduction of something afterwards.'

The often quoted passage from the judgment of Jenkins LJ cannot be abstracted from its context. The basic principle is that where two or more documents are relied upon as together constituting a written memorandum the signed document must refer to another document in such a manner as to incorporate it, or them, so that they can be read together with the signed document. The point made by cases such as *Stokes* and *Timmins* is that the reference to another document need not be express. A reference, express or implied, to a transaction rather than to a document will allow parol evidence to identify the other document. But once identified it must be connected in the sense just described so that the signature authenticates them. This principle has not been abrogated by the 'modern cases'.

[104] There is therefore a considered decision of the Court of Appeal against the authors' opinion. *Timmins* was in turn approved by the Privy Council in *Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646.

[105] I do not consider that a judge at first instance can ignore these authorities.

[106] My judgment so far has proceeded on the basis that the law as expressed in *Timmins* and *Stokes* is applicable. It may not be. In *Thomson v McInnes* (1911) 12 CLR 562 Griffith CJ (with whom Barton and O'Connor JJ agreed) said (at 569):

> 'It is sufficient if the note signed by the party to be charged refers to some other document in such a manner as to incorporate it with the document signed, so that they can be read together. That has been settled for a long time. But the whole contract must be shown by the writing. The reference, therefore, in the document signed must be to some other document as such, and not merely to some transaction or event in the course of which another document may or may not have been written.'

If that passage correctly states the law then Todrell's case fails. There is in the receipt no reference to any other document.

[107] The rule may have been relaxed to accord with the English cases by a subsequent decision of the High Court, *Harvey v Edwards Dunlop & Co* (1927) 39 CLR 302 in which Knox CJ, Gavan Duffy and Starke JJ (at 307) accepted Russell J's formulation in *Stokes*, and extended a reference in the signed document to include 'a reference … to some other transaction' which would allow parol evidence to prove the other transaction and identify a second document.

[108] I proceed on the basis that this is the proper expression of the law. As I have explained this view does not assist Todrell because the transaction identified by parol evidence consists of documents brought into existence ten days after the receipt was written and signed.

[109] Another obstacle lies in Todrell's path. When the memorandum relied upon consists of connected documents the fact that they are connected must appear from the writings themselves. Where the signed memorandum does not refer to another document but, whether expressly or inferentially, to a transaction allowing parol evidence to identify the other transaction, the section is only satisfied when the 'transaction' is written and supplies the terms missing from the signed document. This follows from *Stokes*. The principle is 'if you can spell out of the document a reference … to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if the other transaction contains all the terms in writing, then you get a sufficient memorandum … by reading the two together.'

[110] In *Elias* the Privy Council said (655):

> 'The first enquiry must, therefore, be whether the document signed … contains some reference to some other document or transaction. The receipt in this case clearly did refer to some other transaction … . Parol evidence can, therefore, be given to explain the transaction and to identify any document relating to it … . If, therefore, a document signed by a party to be charged refers to a transaction … parol evidence is admissible both to explain the reference and to identify any document relating to it. Once identified, the document may be placed alongside the signed document. If the two contain all the terms on a concluded contract, the statute is satisfied.'

In *Timmins* it will be remembered Jenkins LJ had said at 130:

> 'If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum …'.

[111] What is meant by 'reading the documents together', or 'placing one document alongside the other' to see if they 'contain all the terms' may be illustrated by what happened in *Timmins*. The documents were a cheque for the deposit signed by the defendant, drawn in favour of the vendor's solicitors, and a receipt which described the property and was signed by the vendor. It was held that the cheque, the document signed by the party to be charged, did not refer to another document or transaction which could be identified by parol evidence. Referring then to the fact that the cheque was drawn in favour of the solicitors and not the vendor, Jenkins LJ said (130):

> '… I do not see how it could be possible without oral evidence to connect the cheque made out in favour of (the solicitors) with the receipt given by the plaintiff.'

Romer LJ said (136):

> '… If one places the cheque and the receipt side by side, it is not obvious on an inspection of them that they originally formed a single document and could be taken and read together. In view of the discrepancy between the payees on the cheque and the signatory of the receipt, it is by no means obvious that the two documents were connected with each other at all.'

[112] The same point is made by Stonham, *Vendor and Purchaser* at p 57:

> '80. The basis of the incorporation by reasonable inference of one document with another may be either that the documents, on being placed together necessarily indicate that they relate to the same transaction, or that they each contain an express reference to a specific transaction, although not an express reference to each other.
>
> 81. Where a document, unsigned by the party to be charged, is to be incorporated with a document signed by such party, the connection … must be from some reference or inference to be found in the signed document. …
>
> 82. The documents must contain some internal reference (express or implied) from the one to the other, leaving nothing to be supplied by parol evidence except the identity, as it were, of the document to which reference is made. …'

The authorities cited in support of the proposition are *Tooth & Co Ltd v Bryen (No 2)* (1922) 22 SR (NSW) 541 at 551, a decision of Street CJ in Eq, and the judgment of Russell J in *Stokes*, [1920] 1 Ch 411 (at 419-420).

[113] The documents in this case when read together do not 'necessarily indicate' that they relate to the same transaction. There is no reference in either document to the other, 'leaving nothing to be supplied by parol evidence'. For a start the parties are different. Todrell, the optionee/purchaser is not mentioned in the receipt though its name appears in the option agreements. Neither Sunstate Traders Pty Ltd nor Mr Romano, who paid the deposit, are mentioned in the option agreements. Without parol evidence one could not know that the deposit was paid on behalf of Todrell. On their face the documents do not refer to the same transaction. The receipt refers to a sale, not to an option to purchase. The subject matter of the documents is certainly the same, i.e. a disposition of an interest in Lots 1, 27 and 28. Critically there is no reference in the receipt to a guarantee. Without parol evidence it is impossible to conclude that Mr Romano's guarantee was an obligation essential to the bargain.

[114] There is nothing in the receipt itself which connects it with the option agreements and guarantees. Parol evidence is needed to identify the purchaser; to 'correct' the description of the transaction which appears in the receipt; and to prove that the guarantee was part of the transaction. The documents do not spell out the contract. They do not coalesce to form a coherent record, memorandum or note, of the transaction.

[115] Todrell's claim fails because of the deficiencies in the written memorandum. That finding is sufficient to dispose of the actions but I will, for completeness sake, mention a further point relied upon by the Finchs and Croydon. It is that the agreement made on 27 October was subject to the execution of formal written contracts and was not to be binding until their execution. There is no doubt that the parties contemplated the preparation and the execution of formal contract documents. The submission is that the case is within the third class described in *Masters v Cameron* (1954) 91 CLR 353 at 360:

> '… The intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.'

[116] Reliance is placed upon *Marek v Australian Conference Association Pty Ltd* [1994] 2 Qd R 521, in which it was said (527-8):

> 'The usual expectation of parties in negotiation for the sale of land is that they will not be taken to have made a concluded bargain unless and until a formal contract is executed. In this State real estate is ordinarily agreed to be sold by the execution by vendor and purchaser of a form of contract adopted by the Real Estate Institute of Queensland and approved by the Queensland Law Society: … . This notorious fact largely explains why these days in land sales the "expectation is strong that the parties do not intend to be bound until a formal contract is executed": … . Exceptionally, the conduct of the parties may reveal an intention to make a binding agreement concerning land before a formal contract is signed. There are, as Jacobs J said … "many cases … where it has been found that parties had entered into a firm agreement even though it was their common contemplation that a formal document would thereafter be executed embodying the terms of their agreement". Where solicitors are to assist in the preparation of a contract for the sale of real estate, that fact tends to make it less likely that the parties desire to be finally committed before the contract's execution.'

[117] But for one fact I would think that this is one of the 'exceptional cases' where the parties did agree to be bound immediately even though they contemplated the preparation of formal contract documents by their solicitors and their execution. The parties met on the afternoon of 27 October in an endeavour to reach agreement, if they could, before 5.00 pm when the Finchs were due to meet Mr Gorman in their solicitor's office to sign a contract to sell the land to Croydon. The meeting was convened urgently. Mr Romano was going overseas that evening and if agreement was to be reached it had to be done then and there. Moreover it was essential that any such agreement be binding so as to shut out the possibility of the execution of contracts with Croydon. The principal purpose in ringing Mr Crimmins was to obtain documents for urgent execution. When that could not happen advice was sought as to how to record the fact of a binding agreement. He gave, according to Mr Romano, advice which was either not fully understood, or not fully explained, so that the document created pursuant to the advice did not satisfy s 59. Nevertheless the fact that an attempt was made shows that the parties did intend to be bound prior to the preparation and execution of the fuller, more formal documents. That the Finch's understood what they had done is shown by their keenness to avoid Mr Gorman. They had expressly commitment themselves to Todrell and they knew that. It is what they intended. There is no doubt Mr Romano intended to have them bound before he left for Singapore.

[118] The one factor which compels acceptance of the submission is the definition of 'call option period' in cl 1.1 of the option agreements sent on 6 November 2006. The period was said to mean 'the period commencing on the date of this deed and expiring at 5.00 pm on that day which is 15 months from the date of this deed.' The agreements sent by Mr Crimmins were undated and were no doubt to be dated when executed by the Finchs as grantor of the options. The call option periods would have thus commenced on the day the Finchs signed the agreements. The option agreements

cannot have taken effect until that day. The period was fixed by reference to that event.

[119] It must follow that the parties did not intend to be bound until execution of the formal agreements.

[120] An alternative way of looking at the point is that the agreements were uncertain until execution. There was no agreement about a critical term, the option period, until its commencement was fixed by execution by the grantor.

[121] Todrell has proved it made a complete oral agreement with the Finchs by which it was to have an option to purchase the lots. The agreement is unenforceable for want of writing and because it was not intended to be binding until execution of the formal agreements.

[122] Accordingly I order that action 1308 of 2007 be dismissed. In action 7786 of 2007 I order that the caveat lodged by the first defendant on the title to Lot 1 on RP 138223 County of Stanley Parish of Redland, title reference 15206164 be removed and further order that the caveat lodged on the titles to Lots 27 and 28 on RP 116824 County of Stanley Parish of Redland, title references 14329059 and 14329060 respectively be removed.