

# SUPREME COURT OF QUEENSLAND

CITATION: *Elias v Forsyth & Anor* [2004] QSC 338

PARTIES: **STEPHEN ANTHONY ELIAS**  
(applicant)  
v  
**DONALD CAMERON FORSYTH**  
(first respondent)  
and  
**ELLA CHRISTINE FORSYTH**  
(second respondent)

FILE NO: SC No 4889 of 2004

DIVISION: Trial

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 15 September 2004; 16 September 2004

JUDGE: Chesterman J

ORDER: **1. It is declared that the applicant validly extended the expiry date of the option exercise period to 31 July 2004;**

**2. The respondents are to pay the applicant's costs of the action to be assessed on the standard basis.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER – OPTION FOR VALUABLE CONSIDERATION OR UNDER SEAL – EXERCISE OF OPTION – where the parties executed a deed by the terms of which the respondents granted the applicant an option to purchase their land – where the applicant wished to extend the option period pursuant to the terms of the deed – where the applicant alleged that the second respondent orally agreed to vary the terms of the option – whether the option period had been validly extended

*Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, discussed  
*Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390, discussed  
*Mehmet v Benson* (1965) 113 CLR 295, discussed  
*Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, discussed

*Spencer v Cali* [1986] 2 Qd R 456, cited  
*Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, cited

COUNSEL: Mr S S W Couper QC  
 Mr P J Dunning

SOLICITORS: Hopgood Ganim for the applicant  
 Varro Clarke & Co for the respondents

[1] The respondents are the owners of several parcels of land at Redbank near Ipswich. The applicant is a property developer. On 9 October 2003 the parties executed a deed by the terms of which the respondents granted the applicant an option to purchase their land for a price of \$5,000,000. The consideration for the grant of the option was \$5,000. The option expired at 4.00 pm on 31 January 2004 unless the terms of the option were extended in accordance with clause 2 of the deed. By clause 4 the option to purchase had to be exercised prior to the expiration of the option period, or the period as extended as the deed provided. Clause 6 made time of the essence ‘in respect of all of the provisions’ of the deed.

[2] Clause 2 was in these terms:

‘2.1 In consideration of the sum of **FIVE THOUSAND DOLLARS (\$5,000.00)** (“First Option Fee”) paid by the Grantee to the Grantor (receipt of such sum being hereby acknowledged by the Grantor) the Grantor grants to the Grantee an option expiring, subject to clause 2.2, at **4pm** on the First Expiry Date for the Grantee or its nominee for and to enter into the Purchase Agreement for the Purchase Price of \$5 Million and Agistment Agreement with the Grantor.

2.2 The Grantee is entitled to extend the Option Exercise Period until the First Extended Expiry Date by payment of the First Extended Option Fee of Ten Thousand Dollars (\$10,000.00) to the Grantor which sum shall be paid in the event that the Grantee wishes to extend the Option Expiry Period and which amount shall be paid to the Grantor at the time that the Grantee serves a Notice of Extension of Option and which notice and payment shall be served and paid not less than two (2) business days prior to the First Expiry Date.

2.3 The Grantee is entitled to extend the Option Exercise Period until the Second Extended Expiry Date by payment of the Second Extended Option Fee of Twenty Thousand Dollars (\$20,000.00) to the Grantor which sum shall be paid in the event that the Grantee wishes to extend the Option Expiry Period and which amount shall be paid to the Grantor at the time that the Grantee serves a Notice of Extension of Option and which notice and payment shall be served and paid not less than two (2) business days prior to the First Extended Expiry Date.

...’.

The 'First Expiry Date' was defined to mean 31 January 2004. The 'First Extended Expiry Date' was defined to mean 30 April 2004 and the 'Second Extended Expiry Date' was 31 July 2004.

- [3] Clause 7.1 provided that any notice to be served under the deed must be in writing and must be served on a party at its address for service. 'Address for service' was, in turn, defined to mean 'the address attributed to that party on the first page of this deed.' The address attributed to the first respondent was 154 Leybourne Street, Chelmer. The second respondent's address was given as 37 Alexandrina Court, Forest Lake. The respondents were once married but are now divorced. For about four years they have been engaged in what they described as 'effecting a property settlement'. The process appears to have been quite amicable. I infer it has been a complicated process given the duration of the task and the fact that Mr & Mrs Forsyth appear to have very substantial holdings of real and personal property. The land at Redbank, the subject of the option, is, or the proceeds of its sale are, to be divided equally between them.
- [4] The applicant spends most of his time in Sydney, though his address is given as Toowoomba. Mrs Forsyth lives and works in Brisbane. Mr Forsyth lives in Brisbane but his work takes him away from the city.
- [5] The parties accept that the option period was extended to 30 April 2004. On 22 January the applicant and the respondents met by arrangement at the Sheraton Hotel in Brisbane where Mr Elias gave them a cheque for \$10,000 and a notice of extension of option in form found in the fourth schedule to the deed. The notice was not, of course, served on the applicants at their respective addresses for service as the deed required. Mr Elias obtained the signature of each of the applicants to the notice by way of confirmation that they accepted service of the notice, in person, at the hotel.
- [6] The parties disagree about whether the option period was extended to 31 July 2004. It is plain that Mr Elias did not comply with the terms of clause 2.3. He asserts that he gave the second notice of extension and paid the further option fee in accordance with terms he agreed orally with Mrs Forsyth on behalf of both respondents. The respondents, for their part, dispute that they agreed to any variation of clause 2.3, or waived its terms, or are estopped from denying that they varied the clause or waived its terms.
- [7] The action turns upon a single question of fact which in turn rests upon who is to be believed about a conversation between Mr Elias and Mrs Forsyth, and a conversation between the applicant's solicitor and Mrs Forsyth, on the afternoon of 28 April 2004.
- [8] A few minutes after 5.00 pm on 28 April 2004 a copy of the notice of extension was sent by email to the respective email addresses of the respondents. As well a copy of the notice was sent by facsimile transmission to Mrs Forsyth's office in Rocklea. On 30 April 2004 the sum of \$20,000 was telegraphically transferred from the applicant's bank to the respondents' joint bank account in Brisbane. The money was returned on 28 May with an intimation that the option period had not been extended in accordance with the deed which was, accordingly, no longer binding on the parties. The applicant's contention is that service of the notice by email and fax,

and payment of the fee on 30 April conformed to the oral agreement he made with Mrs Forsyth.

- [9] None of the parties gave an entirely satisfactory or consistent account of their relevant conversations. Despite the importance of the terms on which they spoke on 28 April and the fact that what had been said was known to be important within a few weeks of the event the parties' recollections are incomplete and inaccurate. Mr Elias tended to taciturnity in his evidence. The respondents, by contrast, were inclined to loquacity, a degree of boastfulness, argumentation and evasion. Despite the shortcomings in Mr Elias' testimony I prefer it to that of Mrs Forsyth. No substantial criticism was directed at the account given by Mr Thiel, the applicant's solicitor (though it is said that he was wrong about the time of his conversation with Mrs Forsyth and that he should be disbelieved because he was uncertain about one detail). I think that conversation, for which there is some corroboration in Mr Thiel's contemporaneous diary note, supports the applicant.
- [10] I will rehearse the evidence and briefly indicate why I prefer the applicant's.
- [11] Mr Elias intended to develop the land, should he purchase it. Whether or not he exercised the option to purchase would depend upon whether he was likely to obtain development approval. That, of course, was why the transaction was structured to allow him time to make enquiries of the local authority. Because of the disruption to business caused by the municipal elections in March 2004, by the end of April Mr Elias had not received any clear indication of whether development approval would be given. Accordingly he wished to extend the option period from 31 July to 31 October 2004. Some time in 'the week of 21 April' Mr Elias spoke by telephone to Mrs Forsyth to raise the topic of an extension of the period to 31 October. He gave no detail of the conversation. On 26 April, having obtained the consent of his co-venturer to the proposal, he spoke by telephone to Mr Forsyth and 'asked him whether Mrs Forsyth had mentioned ... that [he] may be seeking an extension ... to the end of October. He said ... that she had not discussed it ...'. Mr Elias told Mr Forsyth that 28 April (two business days prior to 30 April) was the last day for the extension of the period and he asked Mr Forsyth to speak to his wife 'so that we can get it sorted out.' Mr Forsyth promised to ring back but did not. Mr Elias rang him at 9.00 o'clock that night. He had still not spoken to his wife but agreed he would try to make contact the next morning, 27 April.
- [12] Mr Elias rang Mrs Forsyth the next morning. He explained the nature of his request, to extend the option period by means of the second notice to 31 October rather than 31 July. He also 'made it very clear ... the 28<sup>th</sup> was the day ... because [he] had to pay the money and give the notices on that day ...'. Mr Elias did not hear back so he rang at about 5.00 pm and spoke to Mrs Forsyth. She said she had not been able to speak to Mr Forsyth so Mr Elias then immediately rang him. He explained again that he was 'asking for an extension to the option ... to 31 October. [He] explained ... that [he] needed to know next morning ... that (he) needed to get the notices out and pay ... the money tomorrow.' Mr Forsyth said he would contact Mrs Forsyth and 'get back to' Mr Elias.
- [13] The next morning, 28 April, Mr Elias rang Mrs Forsyth. It seems likely, from the telephone records, that he made three calls between 9.17 and 9.37 am but was unable to contact Mrs Forsyth who, at the time, was sitting for an examination. They eventually spoke at 9.40 am. Mrs Forsyth told Mr Elias that she had not met

Mr Forsyth to discuss the request to extend the option period to October. In that call, or a later one, she told him that the respondents were to meet at lunchtime to discuss the proposal. Mr Elias again made telephone contact with Mrs Forsyth in the afternoon, some time after 2.00 pm, having tried unsuccessfully a little earlier to reach her. She said she wanted a copy of the 'amended deed', no doubt to discuss with Mr Forsyth. Mr Elias rang his solicitor and instructed him to email the document. I should perhaps interpolate to explain that the document in question was not an amended deed but an amended notice of extension which put the date to which the option period was to be extended at 31 October.

- [14] Shortly after 3.00 pm Mr Elias remembers receiving a call from Mrs Forsyth to say that the respondents would not grant the extension. He told her that, in that case, he would send the notices pursuant to the deed to exercise his rights to extend the option to 31 July. In view of the lateness of the hour he asked Mrs Forsyth whether he could send the notice to Mr Forsyth at his email address. She replied affirmatively and supplied the address to Mr Elias. He already had Mrs Forsyth's email address and facsimile number. In the same conversation Mr Elias asked Mrs Forsyth whether she wanted the \$20,000 option fee sent by telegraphic transfer to the respondents' bank or whether it would be acceptable if he paid it personally by cheque when he was in Brisbane on Friday, 30 April. Her reply was 'no, there is not need to TT it. Friday will be fine.'
- [15] Mr Elias then immediately rang his solicitor and instructed him to 'get the notices out.' He gave Mr Thiel the email addresses and the fax number to which the notices were to be sent, and told him that the money did not have to be paid that day. He told Mr Thiel to telephone Mrs Forsyth and confirm the arrangements he had made with her.
- [16] The next morning Mr Elias again spoke to Mrs Forsyth and arranged to meet at the Sheraton Hotel at 5.00 pm the next day, Friday. Mr Elias could not keep the appointment. He telephoned Mrs Forsyth to tell her that he would be unable to meet and asked for her bank details so he could arrange to have the option fee telegraphically transferred from his bank. She gave him the details and the transfer was duly made. She asked for a copy of the receipt, or confirmation that the payment had been made to the respondents' account. Mr Elias instructed his son to send a copy of the confirmation by facsimile. An attempt was made but was unsuccessful because Mr Elias' son had the wrong number. However, Mr Elias spoke to Mrs Forsyth by telephone in the afternoon 'to confirm that she had received the fax and to let her know that the money had gone in.'
- [17] Counsel for the respondents attaches particular importance to this conversation. He submits that it shows that Mr Elias' evidence was untrustworthy. The point is that, in evidence in chief and in cross-examination, Mr Elias said that he had confirmed with Mrs Forsyth that she had received the fax. That cannot, of course, be right because it is clear that the facsimile transmission did not reach Mrs Forsyth. I am not satisfied that the error is anything more than a faulty recollection of a detail. Mrs Forsyth did not dispute that she had a conversation with Mr Elias on the afternoon of the 30<sup>th</sup> during which he told her that the option fee had been paid into the respondents' account.
- [18] Mr Thiel gave evidence that 'at some stage during the day' of 28 April Mr Elias instructed him to send a copy of the amending deed to Mrs Forsyth by email. He

attempted the task twice, at about 2.00 pm and twenty-five minutes later. The transmission was not effected. A third attempt, just after 3.00 pm, succeeded. Some time later he received a phone call from Mr Elias who told him that the respondents would not extend the option period to October and that he should 'issue the notice for extension ... for the original ... period.' Mr Thiel questioned Mr Elias about the payment of the option fee. Mr Elias replied that 'he had agreed with the Forsyths that the money would be paid on Friday.' Mr Thiel advised Mr Elias that the money had to be paid that day. Mr Elias repeated that he had offered to make the payment by telegraphic transfer but had been told by Mrs Forsyth that 'it wasn't necessary and that he could pay it on the Friday.' Mr Elias then instructed Mr Thiel to confirm the arrangement with the respondents and gave him Mrs Forsyth's telephone number.

[19] Mr Thiel then telephoned Mrs Forsyth. He asked her whether she had received his email and she said she had. Mr Thiel said that he understood that the respondents had not agreed to extend the option period to October and confirmed that Mr Elias 'wished to extend the option period under the original deed.' He told Mrs Forsyth that the option fee had to be paid that day and told her that Mr Elias had offered 'to wire transfer the money.' Mrs Forsyth said that there was no need to do that. She made a joke about it, based upon the difficulties experienced earlier in sending the draft amended notice by email. She said 'goodness knows where it might end up ... what's the point of sending it up today? It might be lost.' Mr Thiel also told Mrs Forsyth that the applicant had to serve the notice of extension. She said she knew that to be the case. He asked her to confirm that the fax number he had for her was correct. She did so. He asked where the fax machine was located and she said a fax sent to that number would go 'to her'. He said he would send it as well by email and she gave him Mr Forsyth's email address as well.

[20] Mr Thiel made a note of the conversation shortly after it occurred. He wrote:

'Advised her email is not working – sent e-mail earlier with amending deed & it came back. Advised wanted to extend second option - she said send it to her e-mail & Dons – I asked for fax # as well. I confirmed with her that Steve was coming up to QLD on Fri & he would pay the \$20k as agreed this is fine.'

[21] Something must be said about the times of these conversations. Mr Elias and Mr Thiel swore affidavits deposing to the critical facts in support of an application for summary judgment. In paragraph 14 of his affidavit Mr Elias put the time of his conversation with Mrs Forsyth at 'shortly prior to 4.30 pm' and his conversation with Mr Thiel at 'approximately 4.30 pm.' Mr Thiel puts his conversation with Mr Elias at 'approximately 4.30 pm and his subsequent conversation with Mrs Forsyth at approximately 4.35 pm.' Both Mr Elias and Mr Thiel now put the conversation at an earlier time. This is regarded by the respondents as evidence of their perfidy and as an attempt to avoid a legal difficulty that the truth would establish for their case, if the truth were that the conversations occurred at about 4.30 pm. The legal difficulty is that the applicant relies upon an estoppel. He contends that Mrs Forsyth's intimations that the money could be paid on Friday and that notices could be sent by email and facsimile were representations on which he relied to his detriment by not sending the fee by telegraphic transfer and by not having the notices served at the address for service set out in the deed. Evidence from Mr Ventura shows that the money could have been telegraphically transferred

at any time up until 4.00 pm, but not later. If the conversation did not occur until 4.30 pm Mr Elias could not have made the payment that day and would not have acted to his detriment in reliance upon the representation. If the representation were not made until 4.30 pm he could not have made the payment on the 28<sup>th</sup>.

- [22] The Telstra records for de Mestre & Co show that Mr Thiel spoke to Mrs Forsyth at 3.22 pm. This might be thought conclusive except that the same records show that Mr Thiel sent the notice of extension to Mrs Forsyth at 4.01 pm on 28 April. However the computer notations on the transmitting and receiving facsimile machines both show that the transmission occurred at 5.02 pm.
- [23] Oddly there is no Telstra record of the conversation between Mr Elias and Mrs Forsyth so the time cannot be fixed by that means. There is no doubt the conversation occurred. Both Mr Elias and Mrs Forsyth remember it and recall its content in not very dissimilar terms.
- [24] There is one other item of evidence relevant to the timing of the telephone calls. Mr Thiel printed out a copy of the notice of extension at 3.43 pm so that Mr Elias could sign it. He was to go to Mr Thiel's office for that purpose. It seems inescapable that Mr Thiel would only print out that form of notice once he knew that the respondents had not agreed to the October extension and that Mr Elias required notice to be given under the deed to extend the option period to 31 July. That notice also includes a reference to the fact that the option fee was payable on 30 April. It must be the case that Mr Elias had spoken to Mrs Forsyth and to Mr Thiel before 3.43 pm.
- [25] One other aspect of Mr Thiel's evidence should be recorded. It was that he testified that if Mrs Forsyth had not confirmed that service of the notice by facsimile transmission and email was acceptable to the respondents he would have caused the notice to be served on Mr and Mrs Forsyth at their respective addresses for service. He would have done so by sending a signed copy of the notice by facsimile transmission to process servers in Brisbane with instructions to deliver them urgently.
- [26] Mrs Forsyth remembered the conversation with Mr Elias on 27 April in which he requested an extension to 31 October because he 'hadn't had enough time to get his approvals through the Ipswich City Council; that there had been council elections and delays ...'. She told him she would have to discuss the proposal with Mr Forsyth. She did ring her former husband and made him aware of Mr Elias' request. They agreed to meet the next day, 28 April, to discuss it. She remembers speaking to Mr Elias on the morning of the 28<sup>th</sup> when he asked whether the respondents had agreed to the extension. Mrs Forsyth explained that she was to meet Mr Forsyth at lunchtime and that 'if he wanted us to pursue it that he should email through ... a copy of that amended option ...'. The respondents duly met and decided to reject the proposal. They agreed that Mr Forsyth should telephone Mr Elias to convey the rejection.
- [27] Her next communication with Mr Elias was the phone call 'late in the afternoon' when Mr Elias enquired about the respondents' decision. Mrs Forsyth's account was a little confusing. She said her conversation with Mr Elias was after Mr Forsyth had told the applicant that they 'were not going to extend that option' but Mrs Forsyth repeated the information anyway. Mr Elias 'then asked for (her)

- fax number. He also asked if he could TT the money into her bank account.' Mrs Forsyth said that she did not think that that was possible because 'it was too late in the afternoon.' In cross-examination she said she believed the call was after 4.00 pm because she realised the banks had closed. Mr Elias asked if he could pay the fee by cheque on the Friday at the Sheraton Hotel and Mrs Forsyth agreed.
- [28] Her recollection of the conversation with Mr Thiel was that 'he asked for confirmation of the fax number which I went through with him. He asked about ... TTing money and I said I didn't believe that it was possible.'
- [29] In cross-examination Mrs Forsyth agreed that she commented to Mr Thiel that sending the money by telegraphic transfer might prove to be unsatisfactory because of the difficulties she had encountered earlier in the day receiving the amended notice by email. She agreed she expressed concern, perhaps light hearted concern, that the money might not go to the correct account.
- [30] Mrs Forsyth spoke with Mr Forsyth at 6.15 pm on 28 April. This was about an hour after Mr Thiel had sent the notices of extension by facsimile and email to the respondents. She told Mr Forsyth that Mr Elias was to meet her on the Friday and pay her the \$20,000. Mr Forsyth 'was quite happy about that ... it was okay by us.'
- [31] It is apparent that there is not a great deal of difference between the respective accounts of the conversation between Mr Elias and Mrs Forsyth in which it is claimed the parties agreed to vary clause 2.3 of the deed. Mrs Forsyth's contention is that when she spoke to Mr Elias she did not realise that she was being asked to agree to vary the terms of the clause. She did not appreciate that the fee was payable that day. She thought the deed allowed it to be paid on 30 April. She was similarly ignorant about the deed's provisions as to service. Had she realised she was being asked to commit the respondents to a variation of the deed she would have refused, at least until she had discussed the matter with Mr Forsyth.
- [32] Mr Forsyth confirmed that he met with Mrs Forsyth at lunchtime on 28 April and that following about an hour's discussion they decided against extending the option period to October. Mr Forsyth then went home to prepare for a business trip to Perth the next day. He rang Mr Elias from his home. There is a record of a phone call from his home to Mr Elias at 3.07 pm which he believed to be the relevant conversation. According to Mr Forsyth, having told Mr Elias that the respondents would not agree to the October extension, Mr Elias said that the decision caused him 'some issues insofar as ... finance ... because of the delays experienced with council.'
- [33] Mr Forsyth did not dispute Mr Elias' account of their telephone conversation on 26 April.
- [34] On 2 May Mr Elias spoke to Mrs Forsyth. As he had done in January, he wanted the respondents' signature on a copy of the notice of extension sent on 28 April as confirmation and acceptance that the extension had occurred in a manner acceptable to the respondents. They agreed to meet for the purpose but Mr Elias was again obliged to change the arrangements. He told Mrs Forsyth of his situation and said he would make contact subsequently to arrange a time and place to receive the signed notice. He attempted to make contact on 19 May but Mrs Forsyth did not return his calls. She admitted that by then she was attempting to avoid the applicant.

- [35] The evidence that Mr Elias expressed concern about his financial position appears to be an invention by Mr Forsyth. It was not put to Mr Elias when he was cross-examined about the conversation with Mr Forsyth. Mr Elias, in fact, thought that it was Mrs Forsyth who told him that the respondents had refused his extension to October. Mr Elias has no recollection of speaking to Mr Forsyth after 3.00 pm. He said he spoke to Mr Forsyth about 2.45 pm but he gave no content of the conversation. His phone records do suggest there was such a call.
- [36] There is no record of any telephone conversation between Mr Thiel and Mrs Forsyth or Mr Elias and Mrs Forsyth at 4.30 pm on 28 April. The Telstra records indicate that the last telephonic contact between the applicant and the respondents on 28 April was just after 3.00 pm. This fact supports the conclusion that Mr Elias and Mrs Forsyth had the critical conversation before 4.00 pm. It is likely that Mr Elias contacted Mr Thiel immediately after learning that he would not get his October extension.
- [37] I have no hesitation in preferring the evidence of Mr Elias and Mr Thiel to that of the respondents. Mrs Forsyth in particular was a most unsatisfactory witness. She is clearly a woman of considerable intelligence. She is undergoing a course of university study. When she worked in the businesses jointly owned with her former husband she was the finance director. She supervised and was responsible for three accountants and twenty-seven clerical staff. Despite this obvious proof of her capability she appeared to have enormous difficulty in comprehending and answering straightforward questions. There was a great deal of prevarication and evasion in her testimony. It is necessary to mention only three matters to show why I disbelieve her.
- [38] The respondents met for about an hour at lunchtime on 28 April. They discussed whether or not to agree to an extension of the option to 31 October. The conversation took so long because it involved a consideration of what the extension would mean for the settlement of the overall property dispute between the respondents. A number of adjustments to property rights had to be made and a change to the schedule of one would impinge on others. It was for this reason that the extension of the disposition of the Redbank land was unacceptable. The option deed lay in a file in Mrs Forsyth's office next to where they met. She had earlier in the day asked for a copy of the amending deed to consider Mr Elias' proposal. After some delay she received the document. She claimed never to have looked at the original deed during the course of their discussions. I think this most unlikely.
- [39] Mrs Forsyth claimed that she did not understand when speaking to Mr Elias on 28 April that that was the last day allowed by the deed for giving notice to extend the option period, and for payment of the option fee. She claimed that she thought the deed allowed the applicant until 30 April to pay the fee. This is impossible to believe. Not only is it likely that Mrs Forsyth read the deed on 28 April, she must have understood from the frequent telephone contact she had with Mr Elias on that day that matters were urgent from his point of view because the 28<sup>th</sup> was the last day for giving notice and making payment unless an extension were agreed. Mr Elias claims he told Mrs Forsyth expressly of the situation. I accept he did, but whether he did or not the frequency of telephonic contact between them and the conversations with Mr Elias and Mr Thiel about sending money by telegraphic transfer that afternoon must have made Mrs Forsyth realise that the money was due before the 30<sup>th</sup>.

- [40] The third point arises from Mrs Forsyth's attempt to explain why and when she learnt that Mr Elias had not complied with clause 2.3. It will be recalled that the respondents retained the money paid by way of the option fee for about a month. Mrs Forsyth said she became suspicious that the deed had not been performed according to its tenor when Mr Elias asked her to sign a copy of the notice of extension. Her suspicion led her to look more closely at the deed and then to seek legal advice. This is impossible to believe. The request from the applicant to the respondents to acknowledge receipt of the notices was identical to what had occurred in January at the time of the first extension. Mrs Forsyth conceded that there was nothing remotely suspicious about what happened then. She could not explain why a similar request in April was suspicious.
- [41] One further argument of the respondents should be noticed. It was that Mrs Forsyth had no authority to speak on behalf of Mr Forsyth in relation to varying the terms of the deed or extending its operation. Should anything that Mrs Forsyth said to Mr Elias on the afternoon of 28 April have the legal effect of varying the deed or making a representation giving rise to a promissory estoppel, Mr Forsyth was not affected. The notice not having been given to him or payment made to him in accordance with clause 2 of the deed the option period had not been extended to 31 July.
- [42] This stance does the respondents little credit. There is no doubt that in their initial negotiations with Mr Elias they agreed that Mrs Forsyth would be the point of communication. They explained that Mr Forsyth was often out of his office and was hard to contact. If anything needed to be agreed Mr Elias should communicate with Mrs Forsyth, she would speak to Mr Forsyth and pass on the results of their discussion to Mr Elias. This is what happened in practise. Mr Forsyth's evidence concerning the respondents' first meeting with Mr Elias was that (T. 114.45; T. 115.30-40):

'We ... spoke about our situation and emphasised that the property was in joint names ... and that ... the dealings ... would have to be done jointly, and my words were, I believe, along the lines that the day-to-day traffic would be handled through our office ... the reason ... being that ... I was not available on a daily basis ... [Mrs Forsyth] was working [in the office] fairly regularly ... and therefore ... would get the transmission ... She would ... send them to me ... and then we would either discuss them after work or on the weekends, and then she would convey back to Mr Thiel the changes we were requesting ...'.

- [43] Mrs Forsyth said (T. 64.35-.38):

'It was explained to [Mr Elias] that [Mr Forsyth] was working ... that we'd sold our business and [Mr Forsyth] went with that business ... and I was working at the offices, and that if there was any documents or anything they would have to come through to me. I would then discuss them with [Mr Forsyth] and then we would get back ... to him.'

There is no doubt that by 'we' Mrs Forsyth meant herself.

[44] Accordingly I find:

- (i) Mr Elias and Mrs Forsyth spoke by telephone prior to 4.00 pm on 28 April. They both then knew that that was the last day allowed by the deed for giving notice and paying the fee to extend the option period to 31 July 2004.
- (ii) Mr Elias asked Mrs Forsyth whether the respondents would accept notice by email and facsimile transmission to her fax number and whether they would accept payment by cheque on 30 April or whether they required payment to be made by 28 April in which case Mr Elias would have the fee paid into their account by telegraphic transfer. Mrs Forsyth replied that service by the nominated alternatives would be acceptable as would payment on 30 April.
- (iii) Mrs Forsyth had the authority of Mr Forsyth to make those statements. Alternatively he ratified the alterations to the deed which followed the making of those statements. Notice of extension of the option was given by email to both respondents and by facsimile transmission to Mrs Forsyth shortly after 5.00 pm on 28 April. The fee was paid by telegraphic transfer to the respondents' bank account on 30 April.
- (iv) If the statements had not been made by Mrs Forsyth, Mr Elias would have instructed his bank to make a telegraphic transfer of \$20,000 to the respondents' bank account. The transfer could and would have occurred before 4.00 pm. Additionally Mr Thiel would have sent by facsimile transmission copies of the notice of extension to process servers in Brisbane who would have served them on the respondents' respective addresses for service by the early evening of 28 April.

[45] I should deal briefly with an argument advanced by the respondents. They submitted that the right to extend the option period given by clause 2.3 of the deed had to be exercised prior to 4.00 pm on 28 April. It will be recalled that clause 2.1 of the deed provided that the option period was to expire at 4.00 pm on 31 January 2004. Clauses 2.2 and 2.3, which granted the applicant the right to extend the option period, did not provide that the extension had to be claimed before 4.00 pm. They said instead that notice and payment had to occur 'not less than two business days prior to the expiry date and the extended expiry date' respectively. The respondents submit that clause 2.2 and clause 2.3 should be read as though the rights of extension had to be exercised by 4.00 pm on the relevant day.

[46] I do not accept the submission. The construction contended for is not the natural meaning of the deed, which, as it is expressed, can operate without difficulty. It is not necessary to give it efficacy, or even to make its operation more convenient, to insert into clause 2.2 and clause 2.3 a temporal limitation that the parties did not include. Moreover the structure of the clauses is different. Clause 2.1 provides a precise time at which the option period came to an end. Clause 2.2 and clause 2.3 provide a mechanism for extending the period. There is no obvious reason why the

mechanism had to be put in motion by a particular hour of the day. The clauses provide a comprehensible time limit for their operation. In addition the amendment the respondents seek would not be easy to achieve. It could not be done by merely inserting 'before 4.00 pm' somewhere in the clauses. The time limit expressed would require a substantial change of words.

- [47] The findings of fact I have made establish the applicant's right to the declaration he seeks. Whether by operation of the doctrine of variation, waiver or estoppel the rights of the parties to the deed changed so that the option period was extended to 31 July 2004 upon the applicant giving notice of extension to the respondents by email and facsimile transmission, and by payment of the option fee on 30 April.
- [48] The result is achieved by the doctrine of variation of contract. The parties agreed to vary the mode of performance contained in clause 2.3. There is no impediment to an agreement appearing in a deed being varied by parol agreement. The consideration for the variation is constituted by the extended obligation imposed on the applicant to remain liable to pay the option fee for a further 48 hours and to give notice by alternate means to that specified in the deed. Consideration is also found in the payment of the fee to the respondents who, without the agreement to extend time, would not have been entitled to the payment after 28 April.
- [49] Agreement to extend time for the performance of a contractual obligation, where time is of the essence, has always been regarded as binding. See *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41 at 55; *Spencer v Cali* [1986] 2 Qd R 456 at 466.
- [50] Mrs Forsyth's statement to Mr Elias was a clear indication that the respondents waived the mode of performance required by clause 2.3 of the deed and intimated that an alternative mode would be acceptable. A party to a contract for whose benefit a provision is inserted has always been entitled not to insist on its performance but to treat the contract as otherwise intact. Waiver is the term usually applied to this occurrence. When it occurs, the contract remains on foot, binding both parties, with the exception of the term waived. This is so despite the observations made in the *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 about waiver. In this sense waiver remains part of the law of contract: see the remarks in *Verwayen* (per Mason CJ at 406; per Brennan J at 425; per Deane J at 449 and per McHugh J at 491, 497). Notwithstanding the doubt expressed about the survival of waiver in *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390, there is nothing in *Verwayen* which casts doubt upon *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 in which Gibbs CJ (at 543) and Brennan J (at 565) held that a condition in a contract for the benefit of one party could be waived by that party, or *Mehmet v Benson* (1965) 113 CLR 295 at 305 where Barwick CJ described waiver as the circumstance 'where one party by his conduct gives the other ground to believe that precise performance on time is contracted would not be insisted upon.'
- [51] Similarly the statements made by Mrs Forsyth were clear representations as to her future intention. They were clear intimations that the respondents would not act to terminate the deed if notice were given and payment made in accordance with her representations. The applicant acted to his detriment in not giving notice and making payment in accordance with clause 2.3. He did so in reliance upon the representations. The respondents cannot now act inconsistently with the representations.

- [52] I declare that the applicant validly extended the expiry date of the option exercise period to 31 July 2004. The respondents should pay the applicant's costs of the action to be assessed on the standard basis.