Contracts of Sale , Leases and Electronic Communication: Bound before you know it?

Webinar presented by

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TOPICS TO BE COVERED

[I] *Electronic Transactions Act* and a consideration of what can constitute a signature

[II] Sale of land and E signatures including a consideration of *Stellard's* case Qld SC [2016]

[III] E signatures and guarantees

[IV] Limiting / exemption clauses in an E commerce context with an emphasis on the recent enactment of the B2B provisions in the *Australian Consumer Law*

[V] Options : an analysis of *Matos v JLF Corporation Pty Ltd* at trial [2016] QSC 32 and also on appeal [2016] QCA 355

[I] ELECTRONIC SIGNATURES

1. *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 held that a signature on a contract means a person is, except in the case of deceit or fraud, is bound by what is in it, even if the person has not read it. A signature is thus a powerful thing in commerce—perhaps the cornerstone of commerce, with the handshake being a distant cousin: *Barry v City West Water Limited* [2002] FCA 1214 (mediation—was a matter settled or not?

see e.g. paras [47] – [49]).

2. Certain types of contracts e.g. those involving interests in land, are required to be in writing and signed by the person to be charged or their agent e.g. s 54A *Conveyancing Act 1919* (NSW); with similar provisions in other states. s 23 *Conveyancing Act* (NSW) is also relevant. In Qld, guarantees also have to be in writing, and signed: see s 56 and 59 of the Qld *Property Law Act 1974*.

   Thus, this topic is very important for creditors who wish to obtain the benefit of charging clauses in respect of land, allowing them e.g. to lodge caveats.

3. The *Electronic Transactions Act 1999* (Cth) provides that a transaction under a Commonwealth law will not be invalid simply because it was conducted through electronic communication, and validates the use of electronic signatures.

   Each state and territory has its own broadly similar *Electronic Transactions Act.*

   An electronic signature is any method of electronically indicating that a person has 'signed' an electronic or online document. A signature on paper, scanned into computer file and inserted into a document, would be an electronic signature. However, a *digital signature* is a type of electronic signature that can be verified using a process that validates and connects the signature to a specific person—there are various technologies commercially available, based on public key infrastructure (i.e. encryption and de-cription).

4. The policy underpinning of the legislation is 'functional equivalence', that is, no discrimination will be made between paper based transactions and electronic transactions, and that a contract that is formed automatically is not invalid, void or unenforceable because there was no human review or intervention, e.g. s 14C of the NSW *Electronic Transactions Act 2000*.

5. "Writing" is defined in the interpretation Acts of the various States e.g. NSW *Interpretation Act* s 21 defines writing to include any mode of representing or reproducing words in a visible form; see further eg Qld, the *Acts Interpretation Act* 1954.

[II] Sale of land and E signatures including a consideration of *Stellard's* case Qld SC [2016].
Contract for the sale of land: can it be made via email?

6. *Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd* [2015] QSC 119 suggested Yes. The defendant advertised the Koah Roadhouse (i.e. the business plus freehold) for sale, & the parties' respective agents negotiated *via email*.

   The defendant's agent sent the plaintiff a proposed form of contract via email, setting out the price of $1.6 m but said it was to be "subject to contract". The Plaintiff's agent emailed back, accepting subject to due diligence and also subject to contract. The agent (the son of the director, Drew) intentionally signed off "Drew" by *typing it* (i.e. not a conventional signature).

7. The Defendant found it could get a better price elsewhere, and sought to resile from the arrangement, on 4 grounds:

   (a) the alleged offer was not an unconditional offer capable of unqualified acceptance because it was expressed "subject to contract", (b) the acceptance of the offer was not an unqualified acceptance and (c) the parties did not reach agreement on all material terms and (d) the parties did not manifest an intention to be bound until a written contract in the form of the REIQ standard commercial contract was signed.

   "[2] The plaintiffs claim that a contract for the sale of the roadhouse to them was constituted by an email exchange between them and NQF. NQF says that there was no intention to be legally bound by that exchange and, in any event, there is no sufficient

written memorandum or note to satisfy s 59 of the *Property Law Act* 1974 (“PLA”).”

8. It was held the contract fell into the first category of *Masters v Cameron* [1954] HCA 72; 91 CLR 353, 360-362 viz the parties reached finality in the terms of their bargain and intended to be immediately bound, but proposed to have the terms restated in a fuller form.

   The email was held to meet the requirement for writing signed by a seller in s 59 of the *Property Law Act*. Martin J held that the requirement in s 14(1)(b) was met because the person signing could be *identified* and their *intention* could be established by evidence of various conversations before the email was sent coupled with an admission on the pleadings that the person who sent the email *was duly authorised* so to do.

   HH said as follows at para [68]:

   “…….*In circumstances where parties have engaged in negotiation by email and, in particular, where an offer is made by email, then it is open to the court to infer that consent has been given by conduct of the other party*.”

   (citing *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2011] EWHC 56; [2011] 1 WLR 2575 and, on appeal, [2012] 1 WLR 3674.)

9. The essential point is that it was held that section 14 of the *Electronic Transactions (Queensland) Act 2001* (Qld) could be *supplemented with extrinsic evidence.* Given the trail of emails, the acceptance email contained a ‘signature’, and so there was an enforceable contract for land as it was a ‘*memorandum or writing …signed*‘ by the registered owner or its agent.[1]

[1] For those who wish to be reminded more fully of the 3 categories in *Masters v Cameron*, I recommend *John Hillam v JPSF Pty Ltd* [2017] NSWSC 1510; and a brief look backwards to *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548.

10. The issue of authority, which had loomed so large in *Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd,* arose again, in *John Hillam v JPSF Pty Ltd* [2017] NSWSC 1510. One matter for consideration was whether the typed name of the owner's agent , Ms Mao , could constitute a signature within the meaning of s 9 *ETA*. Even if it could so amount (a matter HH left open), nevertheless , that would not assist the plaintiff, because the "…..email is simply not "recognizable as a note or memorandum of a concluded agreement….": para [276].

Corporations

11. Pursuant to s 127 *Corporations Act 2001* (Cth), a corporation can sign by any method, whilst to s 129 makes certain presumptions of authority. The *Electronic Transactions Act 1999* (Cth) is, however, excluded: Sec 7A(2) of the *Electronic Transactions Act 1999* (Cth) and s. 4 and item 30 of schedule 1 of the *Electronic Transactions Regulation 2000* (Cth). While item 30 refers to the 'Corporations Law', that is taken to include the *Corporations Act 2001* (Cth) under s. 10(b) of the *Acts Interpretation Act 1901* (Cth).

    Thus, if a document is electronically signed by the corporation, then the company has to specifically authorize this; alternatively there must be ostensible authority.

E-SIGNATURES AND GUARANTEES

12. NSW Court of Appeal decision of *Williams Group v Crocker* [2016] NSWCA 265 addressed (or perhaps, re-dressed!) the application of a directors' e-signature to an all moneys guarantee.

    The Williams Group Australia Pty Ltd supplied building material. One of its customers was IDH Modular, which had set up an electronic signing system for the directors to use, called "Hellofax". Hellofax permitted each user to upload a copy of their signature which

could be applied to documents electronically.

This system was set up in circumstances where Mr Crocker, one of the directors, lived in Brisbane whereas the company premises were in Murwillimbah.

Mr Crocker's e-signature was applied to a trade credit application (including a director's guarantee, and purportedly witnessed by the customer's administration manager) in favour of Williams Group. The documents were then returned to Williams Group.

The company defaulted, and Williams Group sought to enforce the guarantees.

Mr Crocker successfully repudiated liability on the guarantee on the bases that:

a. the e -signature on the "Hellofax" system was appended by an unknown person at the company;
b. he did not place the electronic signature on the guarantee, nor
c. did he authorise anyone else to do so, nor
d. was there any "ostensible authority".

13. Ostensible authority is where a principal represents by words or conduct that an agent has the authority to enter, on behalf of the principal, into contracts within a certain compass. E.g. and speaking from memory, a quaint example in the common law was that in days gone by, a wife was presumed to be able to bind her husband's credit in shopping for household necessities.

There was significant evidence about passwords and who had access to the computer system and what documents were able to be viewed by Mr Crocker; whether Mr Crocker had given authority to anyone to use his signature.

A further issue in the case was whether Mr Crocker had acted with sufficient knowledge of the guarantee so as to *ratify* it; but he prevailed in this regard, as well.

14. *Take away lessons from the case:*

From the perspective of the "applier" of the e-signature: there ought be in place a system to ensure the authority has been afforded to the application of the e-signature.

From the perspective of a party such as Williams Group: have a system for checking that the ephemeral but significant e-signature, is what it purports to be. Maybe even pick up the phone and speak to a real, living person to verify this, however heretical that seems in a digital world!

Further, parties in the position of Williams would do well to draw from the lessons of *Commercial Bank of Australia Pty Ltd v Amadio* (1983) 151 CLR 447. The response to that case by financial institutions was to require that a guarantor provided a statement of independent legal advice.

If the amounts of money involved are significant enough, then there is no substitute for dealing face to face or at least, via the 'phone with the relevant person - though a little out of vogue.

EXCLUSION AND LIMITATION OF LIABILITY CLAUSES *& UNFAIR TERMS*

15. *Take away propositions*:

   a. A properly drawn limitation / exclusion of liability clause will operate according to its tenor – as a matter of contract law;
   b. By and large, exclusion and limitation of liability clauses can be trumped by the *ACL*, with certain exceptions tucked away in the ACL, e.g. for carriers and warehouse operators;
   c. The dividing line between direct and indirect/consequential loss is hazy, and subject to the shifting sands of judicial exposition;

d. Limitation and exclusion of liability clauses will only stand a chance of being binding if brought to the attention of the party to be bound *before* or (latest) *at the time* of contract (but for the exception identified below). They will not be binding if e.g. handed to a customer in a glossy booklet after, say, an account is opened at a bank (because that is when legal relations arise between banker and customer) and as the customer leaves the branch;

e. Such a clause may, even if held to be validly incorporated in a contract, be susceptible to being struck down under the unfair contract terms provisions in the ACL.

16. (a) to (c) could occupy a seminar on their own, and time does not permit their consideration here. As such, I will only consider, in this seminar (d) and (e) above, and open for general debate amongst attendees how these principles might apply in an environment of E commerce. The types of matters I wish to raise for debate include:

How can one guard against a contract becoming unwittingly binding in an age where emails between multiple parties, abound?

The pros and cons in an E environment of
- incorporating general terms by reference e.g. hyperlinking or some similar technology e.g. DropBox or the even more foppish "document vault";
- incorporating exempting clauses by reference e.g. hyperlinking etc.;
- seeking to incorporate exempting clauses by having them (probably buried) within the usual mind numbingly long terms that pop up when effecting an E agreement.

17. *In National Australia Bank v Dionys as trustee for the Angel Family Trust* [2016] NSWCA 242, I appeared at trial for Ms Dionys. After a multi-day hard fought trial, the learned trial judge, HH Judge Peter Maiden SC of the District Court, upheld my argument that the Bank had transferred, without authority, about $0.5m of Ms Diony's money out her account.

18. One of the NAB's arguments was that there was a limitation of liability clause, contained in a booklet handed to Ms Dionys at about the time the account was opened, and as she was leaving the Bank. I never conceded that those terms formed part of the agreement.

19. In the event, HH ordered the money to be re-paid to Ms Dionys. The Bank appealed. A significant issue on the appeal was whether the booklet incorporating the Bank's wide ranging limitation and exclusion of liability provisions, had become incorporated into the contract with Ms Dionys; and as part of that, whether the NAB had taken steps reasonably necessary to such terms to Ms Diony's attention.

20. Extracts from paras [77] follow:

"…………the question of whether a limitation clause is included in a contract and the question of when and by what means the contract was made are closely related………………. As I have pointed out, NAB bears the onus of proving that cl 5.18 of the NAB Conditions was incorporated into the agreement between NAB and Ms Dionys. …………….In my opinion, NAB has not established on the balance of probabilities that Mr Ahmad gave Ms Dionys the Booklet containing the NAB Conditions **before** she signed the Authority Card…………………………

Once Ms Dionys signed the Authority Card and the agreement with NAB was finalised, it was not open to NAB unilaterally to introduce new terms and conditions into the agreement, whether by handing her the Booklet or otherwise. …………..

………………… Clause 5.18 is an unusual condition for this purpose because, as I have pointed out, it significantly limits NAB's liability under common law principles and correspondingly curtails Ms Dionys' right. ………………………

21. If a bank wishes a customer to be bound by unusual or onerous terms in a document, there is no obvious reason why it should not ensure that the document is signed. The customer's signature ordinarily gives contractual effect to the document that it otherwise may not have. In the absence of such a signature, the bank runs the risk that

the terms contained in the document will not form part of the contractual arrangements between it and the customer…….”

22. In 2016, the Australian Consumer Law (ACL) was amended to extend protection to small businesses in respect of *unfair terms and conditions in standard form contracts*. A term will be `unfair' if that term:

- would cause a significant imbalance in the rights and obligations of the parties under the contract;
- is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- would cause detriment (financial or otherwise) to a party if it were applied or relied on.

Clauses that might engage these provisions include limitation of liability/ exclusion of liability / entire agreement clauses ; and automatic renewal clauses.

23. In *Meyerowitz-Katz v American Airlines Group Inc trading as American Airlines* [2017] NSWLC 17**,** the aggrieved consumer (a solicitor) successfully submitted that a limitation of liability clause was unfair within the meaning of the *Competition and Consumer Act* 2010 (Cth) Sch 2 (Australian Consumer Law) ss 23-25. Excerpts of the judgment are as follows:

“[61] The International General Rules document is unduly long, complex and poorly formatted. It took the Court more than two hours to read the 98 page document. It is unrealistic to suggest that a customer would read the document prior to purchasing a ticket. It contains substantial information which would be irrelevant to a consumer in the position of Mr Meyerowitz-Katz although the relevance of various terms is only discernible by reading the entire document. The document is in upper case type format throughout which makes it difficult to read. The table of contents is so broad and general that it provides little assistance in guiding the reader to any particular provision. The document fails to use formatted headings to identify the commencement of new sections or to provide

numbering to identify different subsections within Rules. Rule numbering does not follow sequentially. Within each chapter of the document the rule numbering recommences at 70. The language used is inconsistent. It refers to the consumer variously as "*you*", "*him*" and "*the passenger*". It is littered with abbreviations, legalistic phrases and industry jargon.

[62] Mr Meyerowitz-Katz fairly describes the impugned term as "buried" within the International General Rules. *In my view only the most obsessive and time gifted consumer would be capable of digging deep enough to uncover the provision*.

[63] Even if a consumer managed to read through the International General Rules and uncover Rule 72 that consumer would be presented with a provision that is poorly drafted and unclear in meaning. The first sentence, as it appears in the document bears repeating:

"FAILURE TO OCCUPY SPACE IF THE PASSENGER FAILS TO OCCUPY SPACE WHICH HAS BEEN RESERVED FOR HIM ON A FLIGHT OF ANY CARRIER AND SUCH CARRIER FAILS TO RECEIVE NOTICE OF THE CANCELLATION OF SUCH RESERVATION PRIOR TO THE DEPARTURE OF SUCH FLIGHT, OR IF ANY CARRIER CANCELS THE RESERVATION OF ANY PASSENGER IN ACCORDANCE WITH PARAGRAPHS OF THIS RULE, SUCH CARRIER WILL CANCEL ALL RESERVATIONS HELD BY SUCH PASSENGER ON THE FLIGHTS OF ANY CARRIER FOR CONTINUING OR RETURN SPACE, PROVIDED SUCH CARRIER ORIGINALLY RESERVED THE SPACE."

[64] The sentence is a breathtaking 88 words long. The sentence commences with what appears to be a subheading "*Failure to Occupy Space*" which is not separated from what follows. The use of phrases "*occupying space*" and "*continuing or return space*" are not terms of common usage or understanding. *Most consumers would no doubt consider that they are reserving a seat on a plane flight rather than reserving some area of space within the universe*. Instead of making it clear that American Airlines will cancel subsequent flights on an itinerary the provision uses the term "*carrier*". The Rule extends to "*any carrier*" creating the impression that the provision is a general industry rule rather than a term applicable between American Airlines and its customers.

……………

[66] The assessment of transparency is a comparative process involving degrees of clarity ranging from crystal clear to mud. In the present case, American Airlines has presented the term in a form that falls squarely into the muddy end of the range.”

24. Some recent cases where similar questions have arisen include:
(i) *Pacific Resources International Pty Ltd v UTI (Aust) Pty Ltd; Brackley Industries Pty Ltd v UTI (Aust) Pty Ltd* [2012] NSWSC 1274: warehouse destroyed by fire - cause of fire - duties and liabilities of bailee - whether duty discharged-- *whether standard terms and conditions incorporated into contract* - whether standard terms and conditions *exclude liability*;
(ii) *Crane Distribution Limited v Minnicelli* [2013] NSWSC 1611: Formation - Signed document - Incorporation of terms in another document - Objective test of intention - Construction of contract;
(iii) *Clark v Electrical Home-Aids Pty Ltd* [2017] NSWCATAP 63: relief in relation to unfair terms Australian Consumer Law (NSW) s 23 and 24 : purchase of a Miele vacuum cleaner. After payment, consumer handed a receipt that recorded
“1. Warranty ……………………

(Warranty excludes malfunction caused by misuse, abuse, negligence, accident, normal wear & tear or alteration by any person, filters, replaceable bags & drive belts)”

Limitation of liability, Lord Denning and the Age of Automation: all that is old, is new again

25. In this section, I’d like to discuss the application of a “ticket case” of some vintage, to contracts effected via the internet/ web Eg Company X has on its webpage, an offer for the sale of its widgets , or perhaps, to complicate matters a little to more closely resemble real life, lets include travel agents who are selling package deals for a wonderful trip to Antarctica via air, land and sea sectors.

The terms are set out , including reams of boiler plate clauses, which refer ina global and

general way to the more specific terms of the “partners’ in the alliance. One accepts the offer to treat, by hovering ones’ mouse over a little box and clicking Yes. Once one has clicked Yes, one can then pay the fees, and are then taken to the individual websites of the “partners” eg the airline , where there are further reams of clauses.

Sound familiar?

This then brings us to *Thornton v Shoe Lane Parking Ltd* [1970] EWCA Civ 2 .

The free lance trumpeter, Mr Thornton, whose playing was “of the highest quality”, parked his car in Shoe Lane Parking on the way to a gig at the BBC. To get in, he was greeted by an automated red light, which turned green and allowed him to progress to a ticketing machine. He paid his money, and was given a ticket. In small print, there was reference to terms and conditions, which were displayed elsewhere and contained a wide exclusionary clause, including *abrogating statutory rights to compensation for injury*.

Mr Thornton was injured, and sued. Shoe Lane invoked the “ticket cases”, which relied on the fiction that once handed a ticket, the customer could refuse and ask for his/her money back. Lord Denning’s riposte was as follows:

“……That theory was of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the boat or the train.

26. None of those cases has any application to a ticket which is issued by ***an automatic machine***. The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. *He may protest to the machine, even swear at it. But it will remain unmoved*. He is committed beyond recall. He was committed at the very moment he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money in the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. *Thus customer is*

bound by those terms as long as they are sufficiently brought to his notice before-hand, but not otherwise…………"

27. Lord Denning then rhetorically asked the reader to assume that an automatic machine is a booking clerk in disguise, so that the old ticket cases still apply. In that event, said his Lordship, having regard to the nature of the exempting clause, it was so wide and so destructive of rights that in "…order to give sufficient notice, it would need to be printed in red ink with a red hand pointing towards it – or something equally startling……"

As an aside, counsel for the defendant was Mr A. Machin.

Exempting clauses and course of conduct

28. Bear in mind that an exempting clause may become incorporated by reference via *a post -contract* course of conduct: para [55] of *Allen Fabrications Limited v ASD Limited (t/as ASD Metal Services)* [2012] EWHC 2213 (TCC).

***[V]* MATOS v JLF CORP**

Exercising put and call options in relation to the sale / purchase of land: *is there only one key that can unturn the lock*?

29. The cases analysed below indicate that who wins or who loses these types of controversies , on which huge sums of money can hinge , depends on technical rules relating to the true construction of the contract. The question devolves to this : what is the mode of exercise of option stipulated by the contract? Is strict compliance necessary? Or is the clause merely what some cases label as a "machinery provision"?

Matos v JLF Corporation Pty Ltd [2016] QSC 32 and on appeal, [2016] QCA 355

30. Matos had a put option and sought a declaration that it had been validly exercised and an order for specific performance. JLF's riposte, which ultimately found favour with the QCA, was that put option agreement required Matos to sign a contract in the form of the eighth edition of the Standard REIQ Contract but as the signed contract was the tenth edition of the Standard REIQ Contract the put option has not been validly exercised.

Matos bought land off the plan from the JLF . The agreement also provided for a house to be constructed for $210,000, ie a total price of $409,000.

The applicant became the registered owner of the property in January 2012.

"Contract" was defined as meaning the ***eighth edition*** of standard REIQ/Queensland Law Society Approved Contract.

Cl 2.2 was centre stage on the appeal, and hence I set it out in some detail.

JLF granted an option to re-purchase for $100,000 more than the purchase price , in these terms.

"…..JLF grants to Owner an option to sell the Property to JLF *on the terms set out in the Contract*, for the Purchase Price, with settlement of the sale and purchase to be effected on the Settlement Date and subject to the other provisions of this Agreement.

2.3 The Put Option is irrevocable until 3 p.m. on the Put Option Expiry Date.

2.4 The Put Option may be exercised from 9.00am on 1 December 2014 until the Put Option Expiry Date by the Owner delivering to JLF *two (2) copies of the Contract*, duly signed by Owner, to which a *PAMD Form 30c* is attached as the top page and with the following details completed in the Reference Schedule:

A. the full name and address of the Owner under "Seller";

B. the address, description and other particulars of the Property under "Property";

C. the tenants name, term and options, rent and name and address of the managing agent and other particulars under "Matters Affecting the Property; and

D. the Purchase Price under "Purchase Price".

31. As the QCA (but not the trial judge), emphasised,

"Contract" was defied to mean "a contract in the form of contract in Schedule 1". The body of Schedule 1 commences with the "PAMD Form 30c". That is followed by an unexecuted copy of the <u>*eighth edition*</u> of the REIQ/Queensland Law Society standard form of contract for houses and residential land. <u>*The text "Eighth Edition" appears near the top of the first page (which is the first page of the four page Reference Schedule) and at the foot of each of the six pages of contractual terms.*</u> <u>*At the foot of each of the four pages of the Reference Schedule is printed text, "REIQ Reference Schedule 8th Edition – for JLF Put option". A reference to "Eighth Edition" also appears towards the top of the page of "Special Conditions" on the fourth page of the Reference Schedule.*</u> In the Reference Schedule the name, address and contact details of the appellant as the "buyer" are completed, as are some other details, including the place for settlement and the settlement date."

The put option expiry date stated in the Agreement was 3.00 pm on 31 December 2014 with the settlement date specified to be 31 December 2015.

JLF wrote to Matos inviting that the option be exercised, and Matos duly purported to do so in December 2014 , when his solicitors wrote to JLF enclosing a "Put Option Exercise Notice" and "Contract For Sale signed by the Seller".

32. JLF argued that the "contract " which was completed by Matos and forwarded under cover of letter of 16 December 2014 was in the <u>*wrong form*</u> given it was the <u>*tenth edition of the REIQ Standard Form Contract*</u> and not the eighth edition, which was attached in schedule 1 of the Agreement. JLF contended that there were differences between the two

editions and that some of the terms in two editions differed .

JLF thus said that Matos had not not exercised the option in accordance with the Agreement because it was not in the *precise* terms required by the Agreement and that *strict* compliance was required.

33. The cases relied upon the trial judge in reaching the conclusion she did , were *Quadling v Robinson* [1976] HCA 31; (1976) 137 CLR 192, 200-201 and *Phillips Fox (a firm) v Westgold Resources NL* [2000] WASCA 85.

In *Quadling v Robinson* Gibbs J held that "the exercise of an option, to be valid, must have been absolute and unqualified and must have bound the respondents to perform the very terms set out in the option." There is no doubt in this case that the letter of 16 December 2014 was clear in its terms and stated that the signed put option notice was enclosed. Did it bind the respondents to perform the *very terms* as set out in the option given that there was no PAMD Form attached and the fact that a newer version of the Standard REIQ Contract had been signed?

In *Westgold ,* Owen J (agreeing with White J) referred to the oft mentioned necessity for there to be *strict compliance* with the form of the required notice , in the following terms :

"[9] There are two additional factors that have not been mentioned or emphasised and which, in my view, lend support to the trial Judge's conclusion that strict compliance with the exercise regime was required. The first is that this is a put option. I think it is fair to say that the put option is a relatively strange species of transaction. In the property ownership and transfer structure that has been developed in the Western world it is unusual for a person to be forced to take ownership of property. Even in relation to gifts, settlements and testamentary transactions the grantee or beneficiary can disclaim property. This is not so in relation to a put option. This makes it even more amenable to the concepts implicit in the dicta of Lord Greene MR in *Hankey v Clavering* [1942] 2 KB 326 at 329, which both the trial Judge and White J have set out."

34. In *Westgold*, White J quoted, with apparent approval, the judge at first instance who formulated the question before the Court as follows:[14]

"Therefore the big question in this case is whether strict compliance with the mode of exercise which is stipulated in the option deed was the only way the option could be exercised. In particular ought the form of notice of exercise which is scheduled to the deed have been followed; and ought the notice to have contained the information provided for in the form? Or does this option fall into the category of cases in which all that is required is an expression of intention to exercise the option?"

35. Trial Judge [28] "When one considers the terms of the Agreement here the first question which must be answered is what was the intention of the parties at the time the Agreement was entered into? What was the mode of exercise which was stipulated? *Was it that it was the actual eighth edition of the Standard REIQ Contract that had to be signed or was it that the current version of the Standard REIQ Contract at the time the option was exercised had to be signed?* I note that the clause simply says "Contract means a contract in the form of contract in schedule 1" not "Contract means a contract contained in the eighth edition of the Standard REIQ Contract".

Trial Judge [29] : "It cannot be ignored that the contract in the Schedule was simply the Standard REIQ Form and it contained no special conditions. The contract related to a standard residential land transaction. The original contract for the purchase of the property was entered into in 2011 and the put option was exercised some three years later in 2014. It would seem to me that there is a good argument given that lapse of time, that the intention of the parties was that it was the version of the Standard REIQ Contract in use at the time of exercise of the option which was to be used.

Trial Judge [35]: Given that, as at the time the contract was sent by the applicant to the respondent, the *Property Agents and Motor Dealers Act* 2000 (Qld) had been repealed, it is difficult to accept that the applicant was required to attach a then obsolete form, in direct

contradiction to statutory requirements, in order to validly exercise the put option. That could not have been the intention of the parties. It would, in my view, be an absurdity if the applicant was required to send an obsolete form and potentially be exposed to a penalty of up to 200 penalty units by virtue of s 165(5) of the *Property Occupations Act* 2014 (Qld).

Trial Judge [36]: Rather, on the contrary, clause 1.2(f) in my view demonstrates that the parties intended that, when the put option was exercised, the applicant was required to comply with the legislative arrangements then in force. That is, a requirement to use the most up-to-date PAMD form evinces an intention that the applicant ensure current forms and requirements were adopted.

36. The QCA took a different approach to that of the learned trial judge. Their honours on appeal observed that the approach to be taken, consistent with the current approach to the construction of contracts, was objective: one asks what a a reasonable business person would have understood it to mean.

Viewed objectively , the QCA held that though CL 2.4 did not contain an express term requiring the option to be on the terms of the 8th REIQ form, "….that was conveyed with at least equal clarity by the inclusion in Schedule 1 of a form of contract with several identifications in it that it was the eighth edition of the standard form contract. Nothing further was necessary to make that clear, but there was also the statement on each of the four pages of the Reference Schedule, "for JLF Put option".

37. Showing how judical minds can differ on such narrow points, the QCA commented as follows on another of the learned trial judges strands of reasoning:

"[10] The primary judge considered that there was a good argument that, in light of the passage of time between when the original contract for the purchase of the property and the Put Option Agreement were made in 2011 and the purported exercise of the put option in 2014, and the fact that the contract in Schedule 1 was in a standard form and contained no special conditions, the parties' intention was that the edition of the standard form contract in effect at the time of the exercise of the option should be used. An alternative

view is that it is commercially unlikely that the parties intended that the form of contract entered into upon exercise of the option would be determined by persons other than themselves."

Is strict compliance required with the mode of exercise stipulated in the contract ? *Can only one key unturn the lock ?*

38. The real question here is whether it sufficient for there to simply be an expression of intention to exercise the option.

in *Westgold* , the optionee (Westgold) had made very clear, that it would insist on "strict compliance with the terms of the put option deed, including the provision in relation to the form of notice". The trial judge noted that the disconformity with the mode of exercise was not trivial and "[t]here was in truth no attempt at all to conform" in circumstances where the person who purported to exercise the option "did not know or did not have in mind, that any form of notice had been agreed on at all as a notice of exercise."

In Westgold , the trial judge observed that:

"On a plain reading of the two clauses, the prima facie conclusion is that the option could only be exercised by the giving of a form of notice in the form scheduled in the deed. It is that form of notice which the parties have agreed should be 'the key which alone is capable of turning the lock' (Mannai (supra) per Lord Goff at 754).

That this was their intention is confirmed by the *commercial setting* in which the put option deed was negotiated. The circumstances were such that one would expect a precise definition of the conditions which must be met before the option was exercised against Westgold."

39. White J , on the appeal, cited the above with apparent approval.

In *Matos*, after referring to the above principles, the learned trial judge held :

"[39] In the present case it is clear that the signed contract was a later version of Standard REIQ Contract for the Sale of Residential Land and it contained all of the details which were required to be contained in the reference schedule in accordance with clause 2.4. It would seem to me therefore that there was an every effort was made to conform as all the essential terms were contained in that version and, indeed, the only substantial additions were in favour of the respondent."

The learned rial judge also observed tht the optionor in Matos had also not notified that it required strict compliance ; and also did not cavil in real time with the form of the exercise (para [40]).

The learned trial jusge also found some contextual clue in the contrac for sale that the latest form of REIQ contract was contemplated, viz that it contemplated using the more up-to-date PAMD Form 30 c.

The learned trial judge held that the clause referring to the 8th edition of the REIQ contract was merely a machinery provision; not mandatory , and held the option had been exercised.

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