Topic of interest

CONTRACTS PARTLY WRITTEN/PARTLY ORAL:THE NEED FOR CLARITY IN SETTLEMENT TERMS

INTRODUCTION

How often has a matter in dispute been settled by agreement between the parties on the day of the hearing or on the day of its mention or other occasion when it comes before a court or other tribunal? It is not uncommon for the legal advisers of parties to repair to a room in the court precincts and, after negotiations (and often many telephone calls), agree on a settlement and reduce that agreement to writing there and then. This writing may very well include written and signed undertakings to be given to the court or to each other and a noting of consent orders to be made by the court.

It does sometimes occur (indeed more regularly than is desirable) that the parties, in their haste, commit the agreement to writing in terms that would not have been included had more time and attention been given to the phrasing of the document/s.

The failure to commit to writing, fully and explicitly, the terms of an agreement may very well give rise to proceedings being taken by a party seeking to enforce what that party may allege is the agreement and in circumstances where the other party disputes such an allegation.

Or perhaps one party may see that the documentation falls short of properly recording the agreement that was made and thus seeks to have orders made for rectification and so on. The consequences of such proceedings are often the incurring of significant costs and the possibility of an appeal against any determination made at first instance. They are certainly proceedings which were not in the contemplation of either party at the time of the writing of the documentation.

MASTERTON HOMES PTY LTD V PALM ASSETS PTY LTD

The matter of *Masterton Homes Pty Ltd v Palm Assets Pty Ltd*[1] came before the Court of Appeal from a decision of a single judge of the Supreme Court of New South Wales.[2] The short facts of this matter, taken from the judgment of Campbell JA, are as follows:

1. The second and third respondents to the appeal (the developers) were registered proprietors of certain lands in Pemberton Street, Parramatta and had entered into an agreement with the appellant under which the appellant agreed to construct nine town houses and associated car parking.
2. The third respondent was the financier of the project and had two registered mortgages over the subject lands to secure its advances to the developers.
3. It was a term of the building contract that where the developers defaulted in the due payment of moneys to the appellant, "you hereby charge in favour of ourselves as a second ranking charge after the interest of the financier your interest in the land the subject of this Contract".
4. The developers defaulted in the due payment under the contract of a claimed sum of $424,262.77. The appellant thereupon lodged a caveat seeking to protect what it termed its "equitable interest" in the land.
5. The appellant subsequently obtained an adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW), holding the appellant was entitled to a payment of $418,526.54. The strata plan of the land had by then been registered and certificates of title were received by the third respondent.
6. The third respondent, on 6 November 2006, served upon the appellant a lapsing notice concerning the caveat previously registered by the appellant. That caveat could not be maintained pursuant to s 7D of the *Home Building Act 1989* (NSW).[3] Nonetheless, the appellant indicated that it would

[1] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234.

[2] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2008] NSWSC 274.

[3] See also *Kell & Rigby Pty Ltd v Flurrie Pty Ltd* (2006) 67 NSWLR 113.

seek to register another caveat claiming the same interest but this time "as a result of a Judgment entered in the District Court" in the sum of $418,526.54.

7. The appellant commenced proceedings seeking a declaration as to its entitlement to a caveatable interest in the sum of $418,526.54 as chargee of the nine lots in the strata plan and an order that it have leave to lodge a further caveat, claiming a somewhat more limited interest than that claimed in the earlier caveat.
8. On the 8 December 2006, the parties sought to resolve the matter. After a number of discussions and telephone calls, agreement was reached. The parties then sought to commit the agreement to writing. Short minutes were handed to the court and the following orders were made:

> Upon the Plaintiff by its counsel giving to the Court the usual undertaking as to damages,
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> BY CONSENT AND WITHOUT ADMISSIONS THE COURT ORDERS THAT:
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> 1. The operation of Caveat AC250662 be extended to 5 pm 15 February 2007.
> 2. The proceedings be stood over to 15 February 2007 at 9.30 before Deputy Registrar.
> 3. The Notices to Produce served by the Plaintiff on the First and Second Defendants be stood over to 15 February 2007 at 9 am before Deputy Registrar.
> 4. The Notice to Produce and Subpoena for Production of Documents served by the Plaintiff on the Third Defendant to be stood over to 15 February 2007.
> 5. Costs reserved.
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> The Court further notes the following undertaking of the parties:
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> 1. The undertaking of the Solicitor for the Third Defendant on behalf of the Third Defendant to the Court that in the event that any of the lots in the Schedules to the Summons are sold and a sale is completed then the Third Defendant will either:
>   (a) cause the First and Second Defendants to assign and/or transfer to the Plaintiff all BBX dollar credits (net of commission) reserved at settlement of each unit sold, provided that these credits are not less than BBX $100,000; or
>   (b) set aside the sum of $60,000.00 from the proceeds received on the discharge of its first mortgage or the proceeds received from any mortgagee sale of each unit sold into a fund to be held until agreement between the parties or until further order.
> 2. The agreement between the Plaintiff and the Third Defendant that the Plaintiff at settlement of any such sale will hand over at settlement a Withdrawal of Caveats in relation to the unit being sold.

As Campbell JA noted:

> 23. As at 8 December 2006 the Developers had issued contracts to sell and received sales advices from their real estate agent for the proposed sale of units 1, 2, 3, 4 and 9. Those advices contemplated that 30% of the sales price would be paid for with "BBX dollar credits". An amount of $174,000 was to be paid with BBX dollar credits for each of units 1-4 inclusive, and an amount of $166,500 was to be paid with BBX dollar credits for unit 9. According to a letter from the solicitor for one of the Developers, in response to the Subpoena served on that developer, none of the contracts had been exchanged.[4]

By 15 February 2007, the parties were in dispute concerning what had been achieved on 8 December 2006. The appellant contended that the common intention of the parties was that:

> (a) … subparagraph (a) of the undertaking was to be mandatory: that is to say that the parties agreed that in the event that any of the 9 units in the development were sold and a sale completed whereunder BBX credits in excess of BBX $100,000 constituted part of the purchase price, then [the Third Respondent] was bound to take the action provided for in sub-paragraph (a);
> (b) it was only where the credits available for assignment were in an amount not less than BBX $100,000 that sub-paragraph (b) would be activated.[5]

The third respondent maintained that at all times it had the right to elect as between:

> (a) On the one hand to engage sub paragraph (a) in which event that election would be binding (meaning that once the Third Respondent had paid BBX dollars across to the Appellant, it could not somehow claim them back as only having been paid on an interlocutory basis; and

[4] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [23].

[5] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [31].

(b) On the other hand to engage sub paragraph (b) and to do so regardless of the fact that BBX credits in excess of $100,000 were available as constituting part of the purchase price on any particular units (in which event the agreement would only constitute an interim holding measure pending agreement between the parties or further order in the proceedings.[6]

AGREEMENT

The appellant particularised the agreement by averring that:

> The 8 December 2006 agreement is partly oral and partly in writing. The written part is constituted by the terms of the undertakings of the parties which were noted by the Court on 8 December 2006.
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> The oral part consists of the various conversations that took place on 8 December 2006 and which required as a term of the agreement, the provision of the Undertaking by [the Third Respondent] in paragraph 1(a). The undertaking contained in paragraph 1(b) was only included to cover the scenario where the BBX dollar credits available from the sale of a unit were less than BBX $100,000 for that unit.[7]

JUDGMENT

The Court of Appeal allowed the appeal on the ground, inter alia, that the judge at first instance should have weighed up the evidence of witnesses called by each of the parties and a failure to have proper regard to the evidence of one of the witnesses called by the appellant. To that point, the decision of the Court of Appeal is unremarkable.

But the Court of Appeal did not stop there. Campbell JA set out six "principles that are applicable in deciding whether an agreement that parties have entered is one that is wholly in writing or partly written and partly oral". These will each be examined below, beginning with principle number one:

(1) When there is a document that on its face appears to be a complete contract, that provides an evidentiary basis for inferring that the document contains the whole of the express contractual terms that bind the parties.[8]

In support of this contention, Campbell JA cited a number of authorities commencing with the case of *Gillespie Brothers & Co v Cheney, Eggar & Co*[9] and concluding with the case of *Jessop v McInteer*.[10] His Honour continued with the second principle:

(2) It is open to a party to prove that, even though there is a document that on its face appears to be a complete contract, the parties have agreed orally on terms additional to those contained in the writing.[11]

In support of this contention, Campbell JA cited various authorities commencing with *Gillespie Brothers*[12] and concluding with *NSW Cancer Council v Sarfaty*.[13] Included in the cases cited by his Honour was the High Court decision of *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*,[14] in particular, the following portion of the joint judgment of Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ:

> 33. The respondents each having executed a loan agreement, each is bound by it. Having executed the document, and not having been induced to do so by fraud, mistake, or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it. The parol evidence rule, the limited operation of the defence of non est factum and the development of the equitable remedy of rectification, all proceed from the premise that a party executing a written

[6] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [31].

[7] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [31].

[8] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [90].

[9] *Gillespie Brothers & Co v Cheney, Eggar & Co* [1896] 2 QB 59 at 62 (Lord Russell).

[10] *Jessop v McInteer* [2003] QCA 170 at [53] (Muir J, with whom Fryberg J agreed).

[11] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [90].

[12] *Gillespie Brothers & Co v Cheney, Eggar & Co* [1896] 2 QB 59 at 62 (Lord Russell).

[13] *NSW Cancer Council v Sarfaty* (1992) 28 NSWLR 68 at 77A-B (Gleeson CJ and Handley JA).

[14] *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471.

> agreement is bound by it. Yet fundamental to the respondents' case that the operative agreements between the parties were wholly oral, and reached earlier than the execution of the written agreements, was the proposition that the written agreements subsequently executed not only may be ignored, they must be. That is not so. Having executed the agreement, each respondent is bound by it unless able to rely on a defence of non est factum, or able to have it rectified. The respondents attempted neither.
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> 34. There are reasons why the law adopts this position. First, it accords with the "general test of objectivity [that] is of pervasive influence in the law of contract". The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions.
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> 35. Secondly, in the nature of things, oral agreements will sometimes be disputable. Resolving such disputation is commonly difficult, time-consuming, expensive and problematic. Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. At least, it will do so unless relief is afforded by the operation of statute or some other legal or equitable principle applicable to the case. Different questions may arise where the execution of the written agreement is contested; but that is not the case here. In a time of growing international trade with parties in legal systems having the same or even stronger deference to the obligations of written agreements (and frequently communicating in different languages and from the standpoint of different cultures) this is not a time to ignore the rules of the common law upholding obligations undertaken in written agreements. It is a time to maintain those rules. They are not unbending. They allow for exceptions. But the exceptions must be proved according to established categories. The obligations of written agreements between parties cannot simply be ignored or brushed aside.
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> 36. The conclusion that the respondents are bound by the written loan agreements may leave open the possibility that an earlier consensus reached by the parties was in each case a collateral agreement (made in consideration of the parties later executing the written agreement), but that has never been the respondents' case. In another case it may leave open the possibility that the contract is partly oral and partly in writing. But that cannot be so here. The oral limited recourse terms alleged by the respondents contradict the terms of the written loan agreement. If there was an earlier, oral, consensus, it was discharged and the parties' agreement recorded in the writing they executed. It is the written loan agreement which governed the relationship between Rural Finance and each respondent.[15]

As can be seen, such additional oral agreement can be admitted but only on the basis of it being a collateral agreement.[16] What was said in the joint judgment as to earlier oral agreements is that they may be admitted on the basis that "an earlier consensus reached by the parties was in each case a collateral agreement (made in consideration of the parties later executing the written agreement)".[17]

Campbell JA continued with his third principle:

> 3. The parol evidence rule applies only to contracts that are wholly in writing, and thus has no scope to operate until it has first been ascertained that the contract is wholly in writing.[18]

Again a number of authorities are quoted by Campbell JA including what was said by Spigelman CJ in *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd*, where Spigelman CJ noted that:

> In the absence of a written document or a conversation constituting the Transfer Agreement in the relevant respect, it is necessary for the Court to consider the full range of relevant surrounding circumstances when determining the subject matter and terms of the contract. *Principles of law based on the parol evidence rule are not applicable.*[19]

The fourth principle set out in *Masterton* was:

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[15] *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at [33]-[36] (footnotes omitted).

[16] See *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at [35] re "principle".

[17] See *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at [36].

[18] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [90].

[19] *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 at [8].

> 4. Where a contract is partly written and partly oral, the terms of the contract are to be ascertained from the whole of the circumstances as a matter of fact.[20]

Authorities quoted by his Honour included the 1904 High Court case *Deane v The City Bank of Sydney*, where the joint judgment noted that:

> It is another well known rule of construction that, when a contract is partly in writing and partly verbal, all the circumstances may be looked at and considered for the purpose of construing the contract, and even to vary the written documents, and the whole matter is one for the jury.[21]

Campbell JA's fifth principle is, of course, totally consistent with what was said by the High Court in *Deane*:

> 5. In determining what are the terms of a contract that is partly written and partly oral, surrounding circumstances may be used as an aid to finding what the terms of the contract are.[22]

His Honour finished with his sixth principle:

> 6. A quite separate type of contractual arrangement to a contract that is partly written and partly oral is where there is a contract wholly in writing and an oral collateral contract.[23]

Campbell JA also noted that it is "well established that in construction of consent orders, evidence of surrounding circumstances is admissible".[24]

Two matters of importance were further dealt with by his Honour, the first being that ambiguity does not of itself amount to a precondition for a resort to surrounding circumstances.[25]

Secondly, there is English authority that the rule whereby subsequent conduct cannot be used as an aid to construction of a contract does not apply to a contract that is partly written and partly oral Nonetheless, as his Honour further pointed out, whilst the Australian position is not yet completely settled:

> there is a significant body of Australian authority some of which is collected in *Pethybridge v Stedikas Holdings Pty Ltd* [[2007] NSWCA 154] … and including authority in this Court in favour of the view that subsequent conduct cannot be looked at as an aid to construction of a contract.[26]

The order of the court was for the matter to be retried.

CONCLUSION

Two significant conclusions can be drawn from the determination in *Masterton*.

First, when drawing up consent orders, undertakings or terms of settlement, one must be precise and clear in the words that are used. Such a document must also ensure that *all* matters that are in dispute and intended to be covered by the document are indeed covered, including any consequential matters that may arise from the execution of the document and the order of any relevant court or other tribunal.

Secondly, when contending that an agreement is partly written and partly oral, have due regard to all of the principles that were expounded by Campbell JA. The law in this area has been the subject of many authorities and has flowed to and fro over many years. As his Honour pointed out, no doubt it is, in certain areas, still evolving. In the meantime, the principles as to such a contention are, at least in Australia, as enunciated by his Honour.

Adrian Bellemore

[20] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [90].

[21] *Deane v The City Bank of Sydney* (1904) 2 CLR 198; [1904] HCA 44.

[22] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [90].

[23] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [90].

[24] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [109].

[25] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [112]-[113].

[26] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [114].