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Insurance law update

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CASE NOTE

Sale of land email exchange forms binding contract of sale

Terms of proposed agreements communicated via email can unexpectedly become an enforceable agreement. A recent case in Queensland serves as a wake-up call to professionals involved in transactions for the sale of land. In *Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd*[1], the Queensland Supreme Court held that email negotiations between a vendor's authorised representative and prospective purchasers' authorised representatives expressed as "subject to contract":

a. constituted a binding contract; and

b. satisfied the requirements of section 59 of the *Property Law Act* 1974 (Qld) ("**PLA**") that a contract for the sale of land must be in writing and signed by the party to be charged, or its authorised representative.

Additionally, although it is a Queensland decision, it is likely to present as persuasive precedent for Victorian Courts, noting that Victoria has in essence equivalent legislation to the Queensland statutes considered in this case[2].

FACTS

The defendant-vendor, North Queensland Fuel Pty Ltd ("**NQF**"), owned the Koah Roadhouse service station in Queensland. It appointed Colliers International (Cairns) Pty Ltd ("**Colliers**") to act on its behalf in relation to the sale of the freehold and the business.

The plaintiffs' authorised representative requested from Colliers NQF's terms of sale, so that he could obtain authority from the plaintiffs to make a formal offer. Colliers advised the plaintiffs' representative via email that NQF indicated it would sign a contract of sale based on the following:

[1] [2015] QSC 119.

[2] NB: The only difference in the Victorian legislation is that section 126 of the Instruments Act 1958 (Vic) requires any agent signing an agreement for the sale of land to be authorised in writing to do so. We note that this this requirement may be met by compliance with the Electronic Transactions (Victoria) Act 2000 (Vic).

a. a purchase price of $1.6 million;

b. a 5% deposit;

c. stock at cost value;

d. a condition of sale being fuel tank and line testing, and environmental investigations to the purchasers' satisfaction on or before 40 days from the date of the contract; and

e. a settlement of 60 days to take place in Cairns.

The email also attached a draft contract of sale, which contained a special condition that the directors and shareholders of the purchasers must execute a guarantee.

The following day, the plaintiffs' representative sent an email to Colliers confirming an offer of $1.6million "subject to contract and due diligence as previously discussed", and requesting immediate acceptance of the offer with a view to exchanging contracts by "*next Monday*" ("**the offer email**").

Approximately 45 minutes later, an authorised representative of NQF sent a reply email stating, "*We accept the below offer which we understand will be subject to execution of the Contract provided (with agreed amendments) on Monday*" ("t**he acceptance email**").

Three days later, the plaintiffs' solicitor submitted to Colliers an amended contract that omitted the provision of a guarantee by the directors/shareholders of the plaintiffs. Unbeknown to the plaintiffs, at this time, NQF was negotiating with another party who had submitted a higher offer. Relying on the absence of the guarantee in the latest draft contract, NQF notified the plaintiffs, through Colliers, that it was terminating negotiations. The plaintiffs then commenced proceedings seeking declaratory relief.

THE ISSUES

The central issues to be decided by the Court were as follows:

a. whether the email exchange between the parties constituted a valid and binding agreement with respect to the sale and purchase of the roadhouse land and business; and

b. whether the email exchange was sufficient to satisfy the requirement in section 59 of the PLA that a contract for the sale of land must be in writing and signed by the party to be charged, or its authorised representative.

In relation to the first issue, NQF submitted that there was no valid contract as:

a. there was no intention by the parties to be legally bound by the exchange of emails;

b. the offer email was not an offer capable of unqualified acceptance because it was subject to contract; and

c. there was no agreement as to the material incidents of the transaction, such as the provision of a guarantee by the directors/shareholders of the plaintiffs, and the duration of any due diligence period.

Regarding the second issue, NQF argued that:

a. the email exchange was not sufficient to meet the "in writing" requirements in section 59 of the PLA;

b. the acceptance email did not specifically identify who the author of the email was acting for, and therefore did not meet the requirements for a signature to be implied by electronic communications as provided for by section 14 of the *Electronic Transactions (Queensland) Act* 2001 (Qld) ("**ETQ Act**"); and

c. the plaintiffs did not consent to the signature of NQF being implied by electronic communications as required by section 14 of the ETQ Act.

THE COURT'S DECISION

The Court held that the email exchange constituted a valid and binding contract. Relevantly, the Court found that:

» The parties had agreed on the essential terms to the contract, namely what was to be sold, the purchase price, the deposit, when stock was to be valued, when environmental testing was to be finalised, the duration of the due diligence period, and when and where settlement was to take place.

» The expressions used in the email exchange strongly suggest that the parties were content to be bound by the terms upon which they had already agreed, with a view to make a further contract in substitution for the first contract, containing additional terms as agreed.

» The email exchange suggested that the parties were going to take steps to fulfil the terms of the contract immediately upon acceptance, which was consistent with the parties considering there was a valid and binding contract.

- The "subject to contract" reference in the acceptance email was not a qualification to acceptance, but rather showed that the parties had agreed on the essential terms, with the intention that a formal document containing the essential terms be executed at a later date.
- There was no evidence to suggest that the provision of a guarantee by the directors/shareholders of the plaintiffs was an essential term of the contract, or a precondition for the existence of a contract.
- NQF had agreed to the due diligence period as stipulated in the draft contract by sending the acceptance email.

The Court also held that the "in writing" requirements in section 59 of the PLA were satisfied, as the requirements in section 14 of the ETQ Act for implying a person's signature by means of electronic communication were met. Although the acceptance email did not identify any person as the acceptor of the plaintiffs' offer, the Court found that the previous correspondence between the parties established that the acceptance email was sent on behalf of NQF. In addition, the Court did not consider that NQF could reasonably assert that the plaintiffs had not consented to the acceptance of their offer occurring by email when Colliers, on behalf of NQF, had initiated the chain of communication with the plaintiffs by that means.

The Court therefore held that NQF had entered into a binding contract with the plaintiffs for the sale of the roadhouse land and business, and ordered the declaratory relief sought by the plaintiffs.

KEY MESSAGES

The key messages for professionals involved in transactions for the sale of land (i.e., property agents, conveyancers, etc.) and their professional indemnity insurers arising from this case are as follows:

1. Electronic communications regarding offers and purported acceptance occurring prior to the execution of a contract are likely to constitute a binding and valid contract if the essential terms have been agreed.
2. Stating that an offer or acceptance is subject to the execution of a contract will not necessarily be sufficient to result in the execution of the contract being a precondition to the creation of valid and enforceable contract.
3. Electronic offers or acceptances from authorised representatives of vendors and purchasers will be sufficient to meet the "in writing" requirements applicable to contracts for the sale of land.
4. Prior electronic communications between the vendors, prospective purchasers, and their authorised representatives can be utilised by the Court to identify whether a person's signature to a contract should be implied by way of electronic communication.

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