Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd [2015] QSC 119 (15 May 2015)

Last Updated: 20 May 2015

SUPREME COURT OF QUEENSLAND

CITATION:	*Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd*[2015] QSC 119
PARTIES:	**STELLARD PTY LTD** (first plaintiff) **SHARMEN PTY LTD** (second plaintiff) **v** **NORTH QUEENSLAND FUEL PTY LTD** (defendant)
FILE NO:	11998 of 2014
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2015
JUDGE:	Martin J
ORDER:	**Judgment for the plaintiffs.**
CATCHWORDS:	CONTRACTS – FORMATION OF CONTRACTUAL RELATIONS – AGREEMENTS CONTEMPLATING EXECUTION OF FORMAL DOCUMENT – WHETHER CONCLUDED CONTRACT – where the defendant, through an agent, sought expressions of interest for the purchase of a service station – where negotiations between the parties took place via email – where the offer was made 'subject to contract' and accepted 'subject to execution of the contract' - whether the emails constitute a contract – whether the parties reached agreement as to material incidents of the proposed

transaction – whether the parties intended to be legally bound – whether the requirement for a signature is satisfied by the electronic correspondence in accordance with the *Electronic Transactions (Queensland) Act* 2001

Electronic Transactions (Queensland) Act 2001, s 14

Property Law Act 1974, s 59

Masters v Cameron [1954] HCA 72; (1954) 91 CLR 353

Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 95

Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd (1995) 7 BPR 14,551

Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd [2011] EWHC 56; [2011] 1 WLR 2575

Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd [2012] 1 WLR 3674

G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631

South East Oils (Qld and NSW) Pty Ltd v Look Enterprises Pty Ltd [1988] 1 Qd R 680

Todrell v Finch [2007] QSC 363; [2008] 1 Qd R 540

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52;(2004) 219 CLR 165

COUNSEL:	R Perry QC with S Richardson for the plaintiffs V Brennan for the defendant
SOLICITORS:	Thomson Geer for the plaintiffs Preston Law for the defendant

[1] The Koah Roadhouse is a service station on the Kennedy Highway about halfway between Kuranda and Mareeba. In late 2014 the defendant ("NQF"), the owner of the roadhouse, appointed Colliers International (Cairns) Pty Ltd to sell the freehold and the business. Expressions of interest were sought and negotiations took place with representatives of the parties. Most of those negotiations were by email.

[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").

[3] The trial of this action was conducted entirely on the basis of the pleadings, an agreed bundle of documents and a concession by NQF that the plaintiffs were ready, willing and able to complete. No other evidence was called. This was a sensible and effective way to deal with the issues.

The people involved

[4] Before I deal with the questions raised in this matter, it will assist if I first identify the various parties and others involved.

[5] The plaintiffs are associated entities of United Petroleum Pty Ltd. Martin Hurry was an employee of United Petroleum and was authorised to represent it and each of the plaintiffs. Jay Beattie was an employee of Colliers and was authorised to represent NQF in the expression of interest process ("EOI process").

[6] NQF had two directors – Prue Kellahan and Travis de Jong. That company authorised Drew Kellahan to act on its behalf in the EOI process and the proposed sale of the land and business.

The negotiations – what went on between the parties?

[7] In October 2014 NQF listed the roadhouse for sale through Colliers.

[8] On 17 October Mr Hurry inspected the roadhouse in the presence of Mr Beattie and Mr de Jong. During that inspection Mr Hurry said to them words to the following effect:

- (a) That he represented United Petroleum and its associated entities;
- (b) That he was interested in the roadhouse;
- (c) That any contract would be conditional on "due diligence";
- (d) That the contract would contain conditions relating to an environmental site assessment and a "tanks and lines" integrity test; and

- (e) That he would need to see the "financials" for the business for the last two completed financial years.

[9] During the inspection Mr Beattie provided a number of documents and financial records to Mr Hurry including a valuation report by Heron Todd White (Cairns) Pty Ltd.

[10] In emails of 28 October 2014 Mr Beattie provided further records of the roadhouse "to assist with due diligence" including a profit and loss statement.

[11] On 30 October 2014 there were telephone discussions between Mr Beattie and Mr Hurry. In those discussions Mr Hurry said that United Petroleum's associated entities (the First and Second Plaintiffs) would be the buyers with separate contracts for the freehold and the business. Mr Beattie responded that NQF wanted a single contract. Mr Hurry said that he wanted to know the defendant's terms so that he could get authority to make a formal offer.

[12] In an email sent by Mr Beattie to Mr Hurry of 30 October 2014 the following was said:

"Further to our discussion this afternoon, the Sellers have indicated that they would sign a contract on the following terms:

- Purchase price being $1,600,000 for the freehold and business on a going concern basis
- Deposit being $80,000 (5%)
- Stock at cost value – determined the day prior or on the day of settlement
- Condition of sale being fuel tank and line testing, and environmental investigations to the buyers satisfaction on or before 40 days from the date of the contract
- Settlement of 60 days from contract date, or before at the buyers request;
- Place of settlement to be Cairns

Please find attached for your review the draft contract of sale.

Please reply with any additional questions."

[13] The "draft contract of sale" referred to in the email of 30 October 2014 contained an attachment entitled "Annexure A – Special Conditions". Special Condition 1 provided:

"The REIQ Standard Commercial Conditions Commercial Land and Buildings (Second Edition) GST Reprint ("Standard Terms") apply to this Contract except as are excluded or modified be these Special Conditions."

[14] Special Condition 4 provided:

"If the Purchaser is a company then the Purchaser will cause its directors and shareholders to execute the guarantee annexed to this Contract marked "Annexure B" as guarantors. If those guarantors fail to execute the guarantee then the Purchaser will be in breach of this Contract and the Vendor shall be entitled to exercise any of its rights contained in Clause 13 of the Standard Terms or any other rights of the Vendor at law or in equity."

[15] On the following day (31 October 2014) Mr Beattie and Mr Hurry had further telephone discussions. In those discussions Mr Hurry said that:

- (a) although the first plaintiff would buy the subject land and the second plaintiff would buy the business, they agreed to the use of a single contract; and
- (b) the contract would be generally on the terms of Mr Beattie's email of 30 October 2014, with due diligence including: environmental investigations, tank and line testing, and the outstanding "financials".

Mr Beattie asked that this offer be put in writing.

[16] At 4.24pm on 31 October 2014 Mr Hurry sent an email ("the offer email") to Mr Beattie as follows:

"Jay, further to our various discussions, I can confirm our offer of $1,600,000 for the business and freehold of the above property. As advised the freeholds are purchased by an entity related to the two Directors/Owners of United Petroleum, which in this case will be Stellard Pty Ltd.

This offer is of course **subject to contract** and due diligence as previously discussed. We are hopeful of effecting an exchange of contracts next Monday but **need acceptance of our offer immediately** so we are in a position to instruct the appropriate consultants to carry out the necessary investigations.

I look forward receiving your **client's confirmation that our offer is accepted** as clearly **both parties are now going to start incurring significant expenses**." (emphasis added)

[17] Approximately 45 minutes later, Drew Kellahan sent an email ("the acceptance email") to Mr Beattie and Mr Hurry in response to the offer email. It was copied to Tim Dobinson, a solicitor, Prue Kellahan and Travis de Jong. It contained the following:

"Hi Jay and Martin,

We accept the below offer which we understand will **be subject to execution of the Contract provided** (with agreed amendments) on Monday, minimal due diligence period and the provision of all information/reports etc that are obtained by the purchaser during the due diligence period.

We look forward to progressing the matter further on Monday." (emphasis added)

[18] On 3 November 2014, Tony Newton (the solicitor for United Petroleum and the plaintiffs) sent an email to Mr Beattie which contained the following:

"I act on behalf of United Petroleum in the above matter and I have been instructed to forward to you an amended Contract for Commercial Land and Buildings and Annexure A containing special conditions. You will note for the Contract to be completed Schedules A, B, C and D need to be inserted.

My instructions are that my client would like to exchange this contract as soon as possible. Accordingly, would you please arrange for the contract to be completed by inserting the schedules and the purchase price in Item N of the Contract Schedule and have the contract signed by the seller and forwarded for signing by my clients."

[19] Attached to the email of 3 November was a draft contract with annexures which :

- (a) Identified the plaintiffs as the purchasers,
- (b) Removed Special Condition 4 concerning the guarantee,
- (c) Inserted two new conditions:
    - (i) "Due Diligence" which allowed the purchaser to: conduct due diligence enquiries within 40 days of the contract date, and, if not satisfied, to bring the contract to an end.
    - (ii) "Environmental Conditions" which required the purchaser to do certain things and gave the purchaser the right, in certain circumstances, to rescind the contract.

[20] On 7 November 2014 Mr Beattie sent an email to Mr Hurry and another officer of United Petroleum which contained the following:

"Good afternoon Sam and Martin

I received an email from the Seller this afternoon at 4.55 pm.

In the email the Seller he stated that the contract was not accepted due to the change in/addition of conditions to what was proposed to us last week and then, the deletion of the director's guarantee.

That as a result of these changes they did not feel comfortable with how the rest of the due diligence would have proceeded if the above 'start' was indicative of the future dealings.

I have been instructed to inform you that the sellers have entered into another contract for the sale of the Koah Roadhouse.

Our office has not been directly involved in these negotiations, as they have been an unnamed who was engaged with the property directly with the owners prior to our appointment."

[21] The plaintiffs plead that the email exchange on 31 October 2014 constituted a "valid and binding agreement" between the plaintiffs and the defendant with respect to the sale and purchase of the roadhouse land and business.

[22] In the plaintiffs' written submissions the acts constituting the contract are said to be:

- (a) the emails exchanged on 31 October 2014, as informed by,
- (b) the conversations between Beattie and Hurry of the same day and on 30 October 2014, and
- (c) the six dot points recorded in Beattie's email of 30 October.

What else was happening at the time?

[23] While the plaintiffs were dealing with the defendant, it was dealing with someone else.

[24] When Drew Kellahan sent the acceptance email (in which he said: "We accept the below offer which we understand will be subject to execution of the Contract provided (with agreed amendments) on Monday ...") he was referring to the offer made by Mr Hurry in the offer email.

[25] On Saturday 1 November 2014, Drew Kellahan forwarded the email containing that offer to Dean Pradal with the comment:

"Hi mate,

This is the latest.

Drew."

[26] Thirty minutes later, Mr Pradal replied:

"Thanks Drew, I'm looking for investor and Trinity lease for long term."

[27] The following day (Sunday 2 November), Drew Kellahan responded:

"Great to hear. We have rejected the $1.6M as they are doing their figures at the 2012 valuation of $1.9M – so we know they have more in them. They will get back to us by Monday noon. We submitted out fuel figures to them since 1 July and they have seen that our sales are back up to the 2012 level.

As for your guy, we are happy to take $1.75M on terms over one to two years if you say I can trust your investor.

Otherwise, if all funds paid up front, happy to look at a reduction from the $1.75M for Collier's commission (that will be reduced because we are selling to an associate of yours) and any discount you give on the fuel invoice level at the time of settlement based on what we discussed last week i.e., the site staying with the Mobil brand and you securing a Fuel Supply agreement.

As you know, Koah is back to the sales level which obtained the $1.9M valuation in 2012 now that the Kuranda Range road works are finished. Let your investor know this. ...

Look forward to discussing further on Monday.

Drew"

[28] On 3 November 2014 Mr Newton sent the email in [19] above. On the same day Drew Kellahan met Mr Pradal and, on 4 November 2014, sent him the following email:

"Hi Dean,

Further to our meeting yesterday, we will need to get at least a written offer today and preferably a signed Contract.

Reason being, United will withdraw their offer by Wednesday afternoon and we need to have you in place by then – the problem being your flight to Melbourne at lunch tomorrow.

Working back from the $1.75M price, we may save some commission in dealing with you.

What do you think you can drop on the fuel invoice deliveries to us which will determine what further amount we can drop the price by for your investor? As a thought, is it worth asking Linda how much you can write off against us a 'bad debt' which is tax advantageous to you?

Can you look at the $$$ this morning so we can agree on a price for your guy. As stated, United are circa $1.67M and I have told Jay that we will look at it and get aback (sic) to him today with our final counter offer.

I will send you the draft contract so you can pass it on to whomever as time is obviously of the essence.

Thanks.

Drew"

The defendant says that there was no contract

[29] The defendant denies that any contract was formed on these bases:

- (a) The alleged "offer" said to be contained in the offer email from Mr Hurry was not an unconditional offer capable of unqualified acceptance because it was expressed to be "subject to contract".
- (b) The "acceptance" in the acceptance email from Mr Beattie was not an unqualified acceptance of the terms of the 31 October 2014 email from Mr Hurry.

- (c) The parties did not reach agreement as to material incidents of the proposed transaction, namely:
    - (i) Whether the directors of each of the plaintiffs would be required to execute a personal guarantee in the terms proposed by NQF, and
    - (ii) The duration of any due diligence period.
- (d) The parties did not manifest an intention to become legally bound to a contract and no intention can be inferred "where the parties did not progress to the point of execution and exchange" of a written contract in the form of the Contract Commercial Land and Buildings adopted by the Real Estate Institute of Queensland.

What are the principles to be applied?

[30] The principles to be applied in circumstances such as these derive from the excursus on the subject in the joint decision of Dixon CJ, McTiernan and Kitto JJ in *Masters v Cameron*[1]. An accurate summary of that consideration appears in *Halsbury's Laws of Australia*:

"Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the subject matter of their negotiation is to be dealt with by a formal contract, the case may belong to any of three classes.

(1) It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.

(2) It may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.

(3) The case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."[2]

[31] Whether or not a contract has been formed requires an objective determination of the intention of the parties. The task was expressed in this way in *Ermogenous v Greek Orthodox Community of SA Inc*[3]:

"[24] 'It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty.' **To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement.** Yet '[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts'.

[25] Because **the inquiry about this last aspect may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances**, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the 'intention to create contractual relations' requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. **Although the word 'intention' is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened.** It is not a search for the uncommunicated subjective motives or intentions of the parties." (emphasis added, references omitted)

[32] To similar effect is the statement of a unanimous High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[4]:

"[40] This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. **It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.** References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. **The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to**

mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction." (emphasis added, references omitted)

[33] A court must be astute not to be misled by the use of words by the parties which are usually associated with the creation of contracts. As Gleeson CJ said in *Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd*[5]:

" ... the fact that parties to negotiations have agreed upon the major matter under discussion, confidently believing that the remaining matters to be decided will be sorted out later between them or their lawyers, without any difficulty, can sometimes create a misleading appearance of consensus. Such parties may well believe that they have a 'deal' or a 'bargain', and speak and act accordingly, whilst at the same time knowing and intending that further and more detailed agreement is necessary. For that reason, conduct such as shaking hands, or using the language of agreement, can be ambiguous. The resolution of the ambiguity may require more detailed factual and legal analysis."

[34] In the same case, Kirby P (as he then was) summarised the relevant principles in the following way:

"1. The **mere fact** that the parties contemplate the execution of a formal contract, subsequent to an informal agreement, does not mean that that informal agreement is not presently binding;

2. The fact that the parties contemplate the drawing up and execution of a formal contract is a consideration which may point to the conclusion **that no presently binding agreement was intended until that formal contract is executed**;

3. **The existence of matters of importance in which the parties have not reached consensus in their informal agreement will render it the less likely that they intended immediately to be bound before the execution of a formal document**. Even where the parties have agreed on the 'major matters', their subsequent conduct may indicate that they did not intend to be bound until the other issues between them were resolved in a formal document (see in particular *Masters v Cameron*; *Barrier Wharfs Ltd v W Scott Fell and Co Ltd*; and *Marek v Australian Conference Association Pty Ltd*);

4. **In order to determine in what areas the parties were, and were not, in agreement, and what matters they considered necessary in order for an agreement to exist, it is legitimate to examine their subsequent conduct**.

Where correspondence between the parties after an informal agreement refers to important terms and conditions not mentioned during that informal discussion, it may more readily be inferred that the earlier discussion was simply a preliminary negotiation and not a binding agreement;

5. Depending on the size, importance and complexity of the subject matter, **the less formal the initial agreement, the less likely it will be that it was intended to be legally binding and enforceable**. Thus, an oral discussion which contemplates a subsequent formal written agreement is less likely to have been intended to have been immediately binding;

6. It is necessary in every case to consider the nature and importance of the transaction which the parties contemplate. **Where the agreement concerns a large sum, or concerns a significant transaction, it is less likely to have been intended to be presently binding**;

7. **Depending on the subject matter, where the parties have not used solicitors but intended to do so for the drawing up of their formal agreement, that may also be a factor which will point to the non-existence of a binding agreement until the contemplated formalities have been agreed**; and

8. **Where a binding agreement is said to have been formed as a result of correspondence, it is necessary to look at that correspondence as a whole. It is wrong to isolate any part of the correspondence from the rest in order to prove or disprove the existence of a binding agreement. The same approach should be taken to the analysis of words and phrases within the correspondence. Reference to an 'agreement' having been reached does not necessarily prove the existence of a presently binding contract. Conversely, references to a 'proposed' agreement, and similar expressions, will not necessarily mean that no agreement presently exists. It is a question of how the words are to be interpreted in their context, and in the light of the correspondence, viewed as a whole**."[6] (emphasis added, citations omitted)

[35] While the plaintiffs plead that the contract was formed by the offer email and the acceptance email, it is consistent with the authorities set out above to consider those emails in the light of the conversations between Mr Beattie and Mr Hurry and the matters set out in Mr Beattie's email of 30 October 2014.

What effect, in this case, do the words "subject to contract" have? Were the offer and the acceptance unconditional?

[36] In the offer email these words are used: “This offer is of course **subject to contract** and due diligence as previously discussed.”

[37] In the acceptance email the defendant says “**We accept the below offer** which we understand will **be subject to execution of the Contract provided** (with agreed amendments) on Monday ...” (emphasis added).

[38] The use of those words needs to be measured against the relevant context. As McHugh JA said in *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* [7]:

“Even when a document recording the terms of the parties' agreement specifically refers to the execution of a formal contract, the parties may be immediately bound. Upon the proper construction of the document, it may sufficiently appear that the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms: *Sinclair, Scott & Co Ltd v Naughton*.”[8] (citations omitted)

[39] The broader context of the two emails and the other expressions used in them strongly suggests that the parties “were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms”.

[40] It was made known to the plaintiffs that the defendant would sign a contract on the terms set out in the email from Mr Beattie to Mr Hurry of 30 October 2014. On the following day the plaintiffs (through Mr Hurry) emailed the defendant (through Mr Beattie) and confirmed their offer and emphasised the need for expedition:

“We are hopeful of effecting an exchange of contracts next Monday **but need acceptance of our offer immediately** so we are in a position to instruct the appropriate consultants to carry out the necessary investigations.” (emphasis added)

[41] The words used by the plaintiffs as to the effect of acceptance is clear from the closing words of the email:

“I look forward receiving your client’s confirmation that our offer is accepted as clearly **both parties are now going to start incurring significant expenses**.” (emphasis added)

[42] In other words, the parties were to commence the tasks necessary to complete the contract: the engagement of consultants, the preparation of financial and other documents and so on.

[43] The response from the defendant (sent within an hour of receiving the offer email) is consistent with the position that a contract had been formed. Although there is a reference to "subject to execution to of the contract ..." that should not, in the light of the document which preceded it, be seen as a qualification to the acceptance, rather it is more consistent with the parties having agreed on the essential terms with the intention that they would be formally recorded later. Indeed, the words "agreed amendments" is consistent with something already having been resolved and it being acknowledged that there may be amendments to that agreement.

Was there agreement as to: (a) personal guarantees from the plaintiffs' directors, and (b) the length of the due diligence period?

[44] The defendant pleads[9] that there was no contract because there was no agreement "as to material incidents of their proposed transaction, including:

- (i) Whether or not the directors of each of the Plaintiffs would be required to execute a personal guarantee in the terms proposed by the Defendant;
- (ii) The duration of any due diligence period to be allowed to the Plaintiffs."

[45] The issue of personal guarantees was raised in some of the communications from the defendant. The pleading in para 5(d)(i) (above) concerns an alleged absence of agreement as to whether or not the directors "would be required" to execute a personal guarantee. Later in the defence (for example para 6(f)(i)) there is a reference to a "requirement proposed by the defendant" that there be personal guarantees.

[46] In the defendant's Rejoinder there is a further reference to the guarantees (para 3(c)) where it is alleged: "that at no material time did the Plaintiffs agree to the Defendant's requirement that the directors of each of the Plaintiffs provide a personal guarantee in the terms and manner proposed by the Defendant, whether as a condition subsequent to a concluded contract or otherwise".

[47] The defendant does not point to any conversation or any stipulation in any communication that the provision of a guarantee was a condition precedent to the formation of a binding contract. The email from Mr Beattie to Mr Hurry of

30 October 2014 attaches a draft contract of sale which contains a guarantee but its terms are such that it can only be described as a condition subsequent.

[48] In the email from Mr Beattie to Mr Hurry of 5 November 2014 there is no specific reference to a guarantee – only a rather cryptic reference to the "contract conditions as supplied" not reflecting the sellers' understanding the conditions. That email, of course, followed the email of 3 November 2014 in which Mr Newton (acting for United Petroleum) sent a draft contract to Mr Beattie. That draft did not contain a guarantee and, in the absence of such a provision, it might be expected that, had it been important, it would have been specifically raised in the email of 5 November 2014.

[49] The allegation in para 5(d)(i) of the Defence is admitted in the Reply. In other words, it is agreed on the pleadings, that there was no agreement as to the execution of personal guarantees. In the absence of any evidence to suggest that it was a matter essential to the entry into the contract, the absence of agreement does not affect the existence of the contract alleged by the plaintiffs.

[50] The length of the due diligence period was not the subject of any submission by the defendant. In the email of 30 October 2014 from Mr Beattie to Mr Hurry, the defendant nominates a period of 40 days from the date of the contract as the time for due diligence. It can be accepted that that period was agreed by reference to "due diligence" in the email of 31 October 2014 from Mr Hurry to Mr Beattie and because that period was the period nominated in the draft contract provided in the email of 3 November 2014.

Did the parties manifest an intention to become legally bound where they did not progress "to the point of execution and exchange" of a written contract in the appropriate REIQ form?

[51] This ground is tied up with the ground already dealt with concerning the formation of the contract. The material is consistent with a desire by the parties to have the contract which they had reached be formalised by reference to a particular type of Real Estate Institute of Queensland contract.

Negotiations with the eventual purchaser

[52] It is clear that, while the defendant was communicating with the plaintiffs, it was also seeking to deal with another party. These negotiations give the lie to the assertion by the defendant that there were further steps to be taken before there could be a concluded contract with the plaintiffs. The defendant was attempting to play one purchaser off against another in order to increase the

purchase price. The statements made in the email of 2 November 2014 by Mr Kellahan to Mr Pradal makes it clear that that was the intent of the purchaser. That intent, though, does not detract from the existence of the contract with the plaintiffs because the existence of that contract is to be assessed objectively.

What was agreed?

[53] The parties had agreed:

- (a) What was to be sold;
- (b) The purchase price;
- (c) The deposit;
- (d) When stock was to be valued;
- (e) When the testing of tanks and lines was to occur;
- (f) The term of the due diligence period;
- (g) When settlement was to take place; and
- (h) Where it was to take place.

[54] Although the agreement was expressed in informal terms, that must be viewed against the obvious desire each party had to proceed quickly – a desire evident in the early emails. And each party knew that the other was going to take steps immediately – which were consistent with there being a contract. The matters which the defendant said were not agreed were: in the case of the guarantees, not a pre-condition and, in the case of the due diligence period, the subject of agreement.

[55] The plaintiff has demonstrated that there was a contract with the defendant for the sale of the Koah Roadhouse.

Section 59 *Property Law Act* 1974

[56] The defendant also pleads that, if a contract is found to exist, then there is no sufficient writing to satisfy s 59 of the PLA and, thus, the plaintiffs may not bring the action.

[57] Section 59 of the PLA provides:

"59 Contracts for sale etc. of land to be in writing

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

[58] The plaintiffs plead[10]:

"... the Plaintiffs:

(a) adopt the admissions made by the Defendant as to paragraph 1 of the SOC, that the email of the Defendant, dated 31 October 2014, and pleaded at paragraph 10 of the SOC satisfies the requirements of Section 14 of the *Electronic Transactions (Queensland) Act (2001)* as the Defendant's consent is evidenced by or to be inferred from it (if required);

(b) further, or alternatively to paragraph 5(a) of this Reply, say that the conduct of the parties in exchanging email correspondence to form the Contract satisfies the requirements of Section 14 of the *Electronic Transactions (Queensland) Act (2001)* (if required);

(c) adopt the admissions made by the Defendant as to paragraph 1 of the SOC, that the email of the Defendant, dated 31 October 2014, and pleaded at paragraph 10 of the SOC was signed by Drew Hallahan (sic), a person lawfully authorised on behalf of the Defendant sufficient to satisfy Section 59 of the *Property Law Act 1974*."

[59] The defendant admitted (on the pleadings) that:

- (a) Drew Kellahan was authorised by the Defendant to act for it in respect of the proposed sale of the Koah Roadhouse, and
- (b) Drew Kellahan sent the email of 31 October 2014 to Mr Beattie and Mr Hurry (which was copied to Tim Dobinson, Prue Kellahan and Tim de Jong).

[60] The case for the defendant on this part depended, in part, on what it says are the "qualifications" made by both parties through the references to the execution of a formal contract. These, it says, result in any acceptance being qualified. But, that has been rejected above in the analysis concerning the existence of the contract.

[61] The defendant's argument was directed to the operation of the *Electronic Transactions (Queensland) Act* 2001 ("ETQ Act").

[62] Section 14 of the ETQ Act provides:

"14 Requirement for signature

(1) If, under a State law, a person's signature is required, the requirement is taken to have been met for an electronic communication if—

(a) a method is used to identify the person and to indicate the person's intention in relation to the information communicated; and

(b) the method used was either—

(i) as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstances, including any relevant agreement; or

(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and

(c) the person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in paragraph (a).

(2) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature."

[63] It was argued that the acceptance email did not specifically identify for whom the author was purporting to act representatively and, so, the method used in that electronic communication did not sufficiently identify the person (that is, the defendant) whose intention the author was purportedly conveying so as to satisfy s 14(1)(a) of the ETQ Act. It was also argued that the plaintiffs did not consent to the requirement for a signature being met by the method involved in the email of 31 October 2014.

[64] As s 59 of the PLA provides a consequence for the absence of the signature it is, pursuant to s 14(2), affected by s 14(1).

[65] The argument mounted by the defendant on this point is not that the acceptance email, if it otherwise contained an ordinary signature, would not satisfy s 59 of the PLA but that the document does not satisfy s 59 because it does not contain a signature which is supported by s 14 of the ETQ Act.

[66] Section 14 provides that the requirement for a person's signature is met for an electronic communication if a method is used to identify the person whose signature is required and to indicate that person's intention in relation to the information communicated. In the acceptance email, there is no identification of any person as the acceptor of the earlier offer. That is not fatal.

[67] Section 14(1)(b) provides two alternative methods which will satisfy s 14(1)(a). In this case, the second method has been established. The identification of the person and the person's intention can be established by further evidence. That further evidence is made up of the various conversations which were had prior to 31 October 2014 and the offer email together with the admission in the pleading that Drew Kellehan sent the email which expressed acceptance of the offer.

[68] The other point raised by the defendant is that the plaintiff has not demonstrated that it consented to the requirement of the signature being met by using the method referred to above. 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.[11]

[69] It was further argued that the acceptance email did not convey the defendant's intention with the degree of precision necessary to satisfy the objects of s 59 of the PLA. No argument of any substance was advanced to the effect that the various emails did not fall within that category, well recognised, of the joinder of documents type cases.[12]

Orders

[70] I will make a declaration in the terms sought by the plaintiff. Other relief was sought. I will hear the parties on that and on costs.

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[1] [1954] HCA 72; (1954) 91 CLR 353 at 360.

[2] Lexis Nexis, *Halsbury's Laws of Australia* [110-530].

[3] (2002) 209 CLR 95, per Gaudron, McHugh, Hayne and Callinan JJ.

[4] [2004] HCA 52; (2004) 219 CLR 165.

[5] (1995) 7 BPR 14,551 at 14,522.

[6] Ibid at 14,569-14,570.

[7] (1986) 40 NSWLR 631.

[8] Ibid at 634.

[9] Para. 5(d), Defence.

[10] In para 5 of the Reply.

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

[12] *South East Oils (Qld and NSW) Pty Ltd v Look Enterprises Pty Ltd* [1988] 1 Qd R 680 and *Todrell v Finch* [2007] QSC 363; [2008] 1 Qd R 540.
