

LITIGATION AND DISPUTE RESOLUTION

CASE STUDY

The importance of keeping detailed records

HopgoodGanim has been successful in defending proceedings in the Supreme Court of Queensland that sought to terminate a put and call option agreement relating to the purchase of a property. This decision, handed down in early 2012, demonstrates the importance of keeping detailed contemporaneous notes during negotiations, in case the contents of any conversations or meetings ever become an issue in litigation.

Seller's attempt to terminate put and call option agreement refused

In *Street & Anor v Ladini*, Mr and Mrs Street and Mr Ladini were parties to a put and call option agreement for the sale of Mr and Mrs Street's property to Mr Ladini. Mr and Mrs Street and Mr Ladini are neighbours, both owning adjoining properties at Hope Island, and were also good friends. Mr Ladini operates a restaurant at which Mr and Mrs Street dined regularly free of charge, and before the agreement, there was at least one occasion where Mr Ladini had lent Mr and Mrs Street money for a hip replacement operation, which was later repaid interest free.

Mr and Mrs Street had a line of credit with a limit of \$450,000, which was secured by a mortgage over their property. As they were approaching the limit of this line of credit, they were worried that their bank would exercise its power of sale and sell it for a low price. Initially, at their request, Mr Ladini lent some money to Mr and Mrs Street so that they could pay their rates. Subsequently, they conveyed their financial position to Mr Ladini and asked if he wanted to purchase their property. Mr Ladini said that he was interested, but did not want to over-extend himself due to the impact of the global financial crisis. He said, however, that he would be willing to enter into a put and call option agreement. He had \$100,000 available to pay to them as the option fee. The purchase of the property would follow the sale of another property owned by Mr Ladini's daughter or the end of an option period, with payment of the remainder of the purchase price over a period of five years. The two parties also discussed other proposed terms of the option agreement.

Mr Ladini informed Mr and Mrs Street that he wanted the agreement to be properly documented, and that they would meet with his solicitor, Barry Morwood, for that to occur. He later arranged a meeting with Mr Morwood, which both Mr Ladini and Mr and Mrs Street attended, so that the agreement could be properly drafted, and so that Mr and Mrs Street could ask any questions they wanted about the transaction.

There were two meetings with Mr Morwood. The first meeting discussed the deal, after which a draft agreement was prepared. Further instructions were then provided to Mr Morwood and the second meeting discussed the terms of the draft agreement. The parties signed the agreement at the end of the second meeting. During both meetings, Mr Morwood repeatedly warned Mr and Mrs Street that they needed to obtain their own independent legal advice.

After the agreement was entered into, Mr and Mrs Street experienced further financial difficulties and, at their request, Mr Ladini lent them further money. Mr Ladini said that he would do whatever he could to assist Mr and Mrs Street, but it would of course depend on his own financial circumstances. Mr Ladini told Mr and Mrs Street to write down a list of any further money that was lent to them, so that it could be taken into account when the property settled. Loans to this effect were made in multiple sums of \$5,000, and later sums of \$3,000, which totalled \$68,000. Afterwards, as Mr Ladini was having his own financial issues, he said that he could not help them with any further loans.

After engaging solicitors, Mr and Mrs Street alleged that the amounts of money lent were oral terms that formed part of the option agreement - that is, it was agreed between the parties that Mr Ladini would make payments of \$5,000 per month until the option was exercised, even though this was not documented in the agreement. Mr and Mrs Street alleged that as Mr Ladini had failed to do so, he was in breach of the option agreement and they purported to terminate it.

Mr and Mrs Street then began proceedings in the Supreme Court of Queensland, seeking orders that they validly terminated the agreement, or that the agreement be set aside because it was entered into as a result of unconscionable conduct.

There were various inconsistencies with Mr and Mrs Street's affidavit evidence compared with Mr Ladini's evidence, especially concerning their recollection of their dealings with Mr Morwood.

Notably, Mr and Mrs Street alleged that at all times they thought that the transaction was just a "straightforward sale". However, the Court preferred Mr Ladini's recollection of the initial discussions he had with Mr and Mrs Street, and found that it was clear from those initial discussions that a number of years would elapse before the sale was completed. The Court also preferred Mr Morwood's recollection of the meetings over Mr and Mrs Street's recollection due to the very detailed and contemporaneous diary notes that Mr Morwood had prepared.

Importantly, the diary notes were very detailed in terms of the explanations Mr Morwood gave as to how an option agreement operates. Mr Morwood even had diagrams of the various potential outcomes that could occur under such an agreement. The diary notes also contained Mr Morwood's repeated warnings to Mr and Mrs Street that he was not representing them, and that they should obtain their own independent legal advice. Mr Morwood's detailed diary notes were crucial to the factual findings that were made by the Court.

Regarding Mr and Mrs Street's allegation that a requirement to pay \$5,000 per month until the option was exercised formed part of the agreement, the Court found the following:

"I have concluded that it is unlikely that the respondent would have agreed, in a binding way, to pay to the applicants any sum that could be characterised as either interest or a fee for the option agreement that was not documented. There was a flavour to Mr Street's evidence that in some instances he was recalling what he wished for, rather than what happened.

"It is relevant to my conclusion that the respondent was keen to ensure that the agreement was binding and sought the advice and assistance of Mr Morwood. As the respondent proposed to develop the property with his property, he would not have agreed to make any payment in a way that would deprive him of any potential business benefit from making that payment.

"After being so careful to involve Mr Morwood in the preparation of the agreement, I am satisfied that the respondent would not have jeopardised the efficacy of that agreement by agreeing on an additional oral term that was not to be included in the agreement."

As the Court did not accept Mr and Mrs Street's evidence about these events, it dismissed their claim that they validly terminated the agreement.

Alternatively, Mr and Mrs Street alleged unconscionability, and that Mr Ladini took advantage of them in entering into the agreement. It was argued that this was due to their ages and infirmity, and the lack of assistance or explanation given to them about the agreement when it was required.

However, the Court found that Mr and Mrs Street failed to establish that the agreement was "grossly improvident". The Court was not satisfied that the evidence established any concerns with their ages or infirmity. Importantly, the Court found that Mr and Mrs Street clearly had an opportunity to obtain independent legal advice. The Court concluded by finding that "the failure of the applicants to seek independent assistance or explanation, despite the opportunity to do so, did not place them at a special disability in dealing with the respondent". As a result, the Court dismissed the unconscionability argument.

Key contacts



Darrell Jardine
Partner

Tel +61 7 3024 0323
d.jardine@hopgoodganim.com.au



Anthony Pitt
Senior Associate

Tel +61 7 3024 0349
a.pitt@hopgoodganim.com.au