So that's settled then...

Queensland Phosphate Pty Ltd v Korda [2017] VSCA 269

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Summary

The Victorian Court of Appeal recently found that a brief exchange of correspondence between solicitors did not conclude a binding settlement agreement, short of an executed written document conclusively "wrapping-up" the matters in dispute.

Background

The respondents, Mark Korda and Craig Shepard (Liquidators), were appointed liquidators of Legend International Holdings Inc (Legend) on 2 June 2016. Legend was the 100% owner of Paradise Phosphate Ltd (Paradise), the second applicant, and owners of various phosphate tenements in Queensland. Paradise and Queensland Phosphate Pty Ltd (QPL) were both directed by Pnina and Sholom Feldman.

On 2 June 2016 Legend, Paradise and QPL entered into a convertible bond and share subscription deed (Bond Deed) and a general security deed (Security Deed) by which QPL advanced $400,000 to Paradise.

In March 2016 QPL enforced its security and appointed a receiver and manager to Paradise and a receiver to Legend's shares in Paradise. A sale agreement was signed on 22 April 2016 for the sale of Legend's shares in Paradise to QPL for $1. The Liquidators commenced a proceeding on 7 November 2016 seeking *inter alia*, that Paradise be wound up; the Bond Deed and Security Deed be voided as an uncommercial transaction and insolvent transaction and that the share sale agreement be declared void. Enforceable undertakings were given by the Feldmans preventing the disposition or dealing with of any of the assets of Paradise until final resolution of the proceeding, listed to be heard on 1 May 2017.

On 10 April 2017, the solicitors for Paradise and QPL (Applicants) made 2 offers to resolve the proceeding, both of which contained clauses that "the parties (including our clients' directors) will enter into a deed of settlement and release."

Neither was accepted by the Liquidators and on 19 April 2017 the Liquidators made a counter proposal which included terms on which the Liquidators were "willing to settle the Proceeding":

- Legend's shares in Paradise to be sold in an open market process;
- QPL would forgo any rights under the Bond Deed and Security Deed, but would be paid the $400,000.00 advanced, as well as interest and capped costs of the receivership in priority;
- QPL and the Feldmans would not challenge the intercompany loan position and would give fresh undertakings to the Court; and
- the proceeding be dismissed with no order as to costs.

The offer would remain open until 5pm 26 April 2017, at which point it would expire.

On 25 April 2017 the applicant's solicitors sent an email to the Liquidators' solicitor indicating "We are instructed to accept your clients' offer. "We will correspondent (sic correspond) with your firm tomorrow in respect to the agreed terms."

First Instance

Despite subsequent telephone conversations between the solicitors, in which the Applicants' solicitor argued a concluded settlement had been reached, but nevertheless participated in discussions about a deed of settlement, a deed wasn't entered into, and on 27

April 2017 the Liquidators filed a summons seeking a declaration the proceeding had not been settled and remained extant. The summons was heard at first instance by Judd J.

Judd J held that the relevant test in construing whether a completed settlement agreement had been concluded was "the intention of the parties, objectively ascertained by the language they have employed in light of the surrounding circumstances."

In determining that there was no concluded agreement, Judd J held that:

- this was not a simple proceeding between ordinary litigants. Liquidators, as officers of the Court, were subject to statutory duties, which the Applicants would have understood. Any orders sought for a share sale would have required agreement from creditors or order of the Court;
- selling in an open market process would necessarily involve a detailed sale regime;
- it went without saying that the Feldmans would have required releases;
- the requirement not to challenge the intercompany loan position would need further detailing;
- the Applicants' solicitor in concluding that "we will correspond with your firm tomorrow in respect of the agreed terms" knew that further negotiation and terms were necessary; and
- the fact the trial was to be heard on 1 May 2017 (being very soon after the alleged settlement) was not determinative of the issue.

Appeal

On appeal, the Applicants contended that the Liquidators' letter contained the essential terms of the agreement and upon its acceptance, nothing remained to be agreed. Specifically, they submitted that the share sale needed Court or creditor approval was at most a condition subsequent; it did not go without saying that the Applicants and the Feldmans would require releases; the open market sale process was readily understood and did not require further explanation; and necessary amendments to the required undertakings were simple and clear.

In dismissing the appeal and finding for the Liquidators the Court held "the question of whether there was a binding agreement is one that fails to be determined objectively from the terms of the emails, read in the light of the surrounding circumstances and having regard to the commercial context in which they were exchanged." In making that assessment the Court could therefore look to the parties' subsequent conduct as a guide to what the parties considered to be important or essential to the transaction, for admissions, and as probative of the parties' contractual intention.

Unlike Judd J, the Court did not place great weight on the Liquidator's counter proposal omitting reference to a deed of settlement and release as the Applicants' previous proposals had, nor the Applicants' solicitors 25 April 2017 email, which they found, could, on another view, have been saying no more than further correspondence regarding appropriate court orders, rather than terms of an agreement, was required.

Ultimately it was the context and subsequent communications between solicitors which led the Court to find that the email exchange did not constitute a completed agreement. Specifically, the nature of the subject matter caused the Court to determine the parties intended a number of issues to be further considered, including the payment of Paradise's expenses during the sale process; the fees payable to the Receiver; and what may be recoverable from Paradise's assets. Further, the parties' solicitors had subsequently discussed whether the Feldmans would provide releases and/or remain directors, and the likely inability to get new directors.

In summary, the Court held the nature of the proceeding; the proposed settlement; and the discussions, correspondence and interlocutory steps undertaken strongly suggested that despite agreement on basic

settlement terms, it was intended all matters would ultimately be concluded in a settlement document.

Implications

This case acts a reminder of the pitfalls of informally expressed settlement offers, even when understandably made in the intense context of settlement negotiations shortly before a hearing, and in the context of previous, similar type, offers.

The decision makes clear the need to manage other parties' expectations of the settlement process by being express, clear and unambiguous in an offer as to what is required for there to be a settlement.

Settlement offers should either state all terms exhaustively, or, and more commonly, state fundamental terms with express reference to how and when there will be settlement.

A phrase we commonly adopt in offers is "for the avoidance of doubt, there will be no settlement unless and until executed counterparts of a deed of settlement are exchanged."

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