SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2017 0056

QUEENSLAND PHOSPHATE PTY LTD — First Applicant

and

PARADISE PHOSPHATE LIMITED — Second Applicant

v

MARK ANTHONY KORDA and CRAIG PETER SHEPARD (as joint and several liquidators of LEGEND INTERNATIONAL HOLDINGS INC (IN LIQUIDATION)) — Respondents

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JUDGES:	TATE, BEACH JJA and SIFRIS AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	31 August 2017
DATE OF JUDGMENT:	26 September 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 269
JUDGMENT APPEALED FROM:	*Mark Anthony Korda and Craig Peter Shepard (as joint and several liquidators of Legend International Holdings Inc (In Liq)) v Queensland Phosphate Pty Ltd & Paradise Phosphate Ltd* (Unreported, Supreme Court of Victoria, Judd J, 1 May 2017)

CONTRACT – Offer and acceptance – Exchange of emails – Whether parties made binding contract – Whether parties intended to be immediately bound by what they had agreed – Whether agreement contemplated execution of formal deed of settlement and releases.

CONTRACT – Appeal – Judge's finding that parties' agreement contemplated execution of formal deed of settlement before agreement became binding – Whether Judge's finding was correct – Judge's finding correct – Application for leave to appeal granted – Appeal dismissed.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr L Glick QC with Mr D Ratnam	Judd Commercial Lawyers
For the Respondents	Ms C G Button with Ms R Zambelli	Arnold Bloch Leibler Lawyers and Advisers

TATE JA
BEACH JA
SIFRIS AJA:

1 The issue in this case is whether an exchange of emails between the parties' solicitors gave rise to a concluded and enforceable agreement to terminate a proceeding that was on foot at the time the emails were sent. The judge at first instance ruled that the exchange did not constitute such a settlement[1] and made a declaration that the proceeding was not settled and remained extant. The applicants, who were the defendants in the proceeding below, seek leave to appeal from the decision made by the judge. They contend that the exchange effected a concluded and enforceable agreement to terminate the proceeding immediately.

Background facts

2 The respondents were appointed liquidators of Legend International Holdings Inc (in liq) ('Legend') by order of Randall AsJ on 2 June 2016. Legend owns 100 per cent of the shares in the second applicant, Paradise Phosphate Ltd ('Paradise'). Paradise owns various phosphate tenements in Queensland. The current directors of Paradise are Mr Sholom Feldman and his mother, Mrs Pnina Feldman. Mr Feldman and Mrs Feldman are, respectively, the nephew and sister of Mr Joseph Gutnick.

3 The plaintiffs were appointed liquidators of Legend on the application of Legend's judgment creditors, Indian Farmers Fertiliser Cooperative Ltd ('Farmers Fertiliser') and Kisan International Trading FZE ('Kisan'). The debt owed by Legend to Farmers Fertiliser and Kisan arose from an arbitral award made in Singapore against Legend and Mr Gutnick. On 8 October 2015, Farmers Fertiliser and Kisan brought a proceeding in the Trial Division seeking to enforce the arbitral award as a judgment.

4 On 25 November 2015, Paradise and Legend entered into a convertible bond and share subscription deed ('the Bond Deed'), and a general security deed ('the Security Deed'), with the first applicant, Queensland Phosphate Pty Ltd ('Queensland Phosphate'). In addition

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1 *Mark Anthony Korda and Craig Peter Shepard (as joint and several liquidators of Legend International Holdings Inc (In Liq)) v Queensland Phosphate Pty Ltd & Paradise Phosphate Ltd* (Unreported, Supreme Court of Victoria, Judd J, 1 May 2017) ('Reasons').

to being directors of Paradise, Mr Feldman and Mrs Feldman are also directors of Queensland Phosphate.

5 Queensland Phosphate subsequently advanced $400,000 to Legend under the Bond Deed and the Security Deed.

6 On 21 December 2015, the application by Farmers Fertiliser and Kisan, against Legend and Mr Gutnick, to enforce the Singaporean arbitral award was granted.[2]

7 In March 2016, Queensland Phosphate enforced its security and appointed a receiver and manager to Paradise and a receiver to Legend's shares in Paradise ('the Receiver'). On 22 April 2016, the receiver signed a share sale agreement ('the Share Sale agreement') conveying Legend's shares in Paradise to Queensland Phosphate for one dollar, subject to an adjustment mechanism based on a valuation being obtained of Paradise's shares. The share transfer form is currently held in escrow.

8 On 7 November 2016, the respondents, as liquidators of Legend, commenced the proceeding that forms the subject matter of the present application for leave to appeal. The relief sought in the originating process included:

(a) the appointment of a provisional liquidator to Paradise;

(b) orders winding up Paradise in insolvency or on the just and equitable ground;

(c) orders setting aside the Bond Deed and the Security Deed as a voidable transaction (on the basis that they were an uncommercial transaction and an insolvent transaction); and

(d) orders declaring the Share Sale Agreement to be void and of no effect and the Receiver's appointment to have been void.

9 The application for the appointment of a provisional liquidator to Paradise was to be heard on 11 November 2016, but was adjourned to a date to be fixed when undertakings were given by Queensland Phosphate, the Receiver and by the Feldmans personally. The

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2 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724. An appeal from this judgment was dismissed on 9 February 2016: *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732.

undertakings endure until the proceeding is determined. By their undertakings, Mr Feldman and Mrs Feldman agreed, until final determination of the proceeding or until released by the Court from the undertakings, not to cause, procure or assist Paradise or the Receiver to sell, transfer, dispose of, encumber or otherwise deal with any interest of Paradise or any part of its assets. Mr Feldman and Mrs Feldman also gave undertakings not to exercise any power they may have had to amend Paradise's share register. By his undertaking, the Receiver undertook not to deal with the shares in Paradise, including not to transfer or to complete any transfer of them to Queensland Phosphate. Queensland Phosphate undertook, amongst other things, not to sell, transfer, dispose of, encumber or otherwise deal with any part of any interest it held in the shares or assets of Paradise.

10 On 22 December 2016, the Receiver resigned his appointments as receiver and manager to Paradise and receiver to Legend's shares in Paradise.

11 On 27 January 2017, the proceeding brought by the liquidators was listed for trial, on an estimate of five days, commencing on 1 May 2017.

12 On 10 April 2017 Judd Commercial Lawyers, solicitors for the applicants (defendants), wrote to Arnold Bloch Leibler, solicitors for the plaintiffs (respondents), with alternate proposals to resolve the whole proceeding. By the first letter, the applicants proposed:

> 1. Legend and QPL [Queensland Phosphate] will agree to sell the phosphate assets and/or shares of Paradise for fair market value to a third party.
>
> 2. Of the proceeds of such sales, QPL shall be entitled to be paid the amounts owed to QPL pursuant to the convertible bond and subscription deed and QPL's costs of the receivership.
>
> 3. The balance of the proceeds of sale will be the property of Legend.
>
> 4. The parties (including our clients' directors) will enter into a deed of settlement and release.
>
> 5. Subject to the above, this proceeding is dismissed with no order as to costs with all costs orders vacated.
>
> Our clients are content for this offer to remain open until 12.00 pm on 18 April 2017. If this offer is not accepted by that time it will automatically expire.

13 The second proposal was as follows:

1. Legend and QPL will cause Paradise to transfer the Paradise North phosphate project to QPL, the consideration of which shall be the funds advanced by QPL and the costs of the receivership.

2. The parties (including our clients' directors) will enter into a deed of settlement and release.

3. Subject to the above, this proceeding is then dismissed with no order as to costs with all costs orders vacated.

Our clients are content for this offer to remain open until 12.00 pm on 18 April 2017. If this offer is not accepted by that time it will automatically expire.

14 The respondents did not respond to the applicants' proposals prior to expiry on 18 April 2017, but on 19 April 2017 sent an email that attached a letter containing a counter offer as follows:

We refer to your without prejudice offers dated 10 April 2017 (**Offers**).

We are instructed that:

(a) the Offers are not acceptable to our clients and are rejected;

(b) our clients are willing to settle the Proceeding on the following basis:

(i) our clients are to sell Legend's shares in Paradise Phosphate Ltd (**Paradise**) in an open market process;

(ii) Queensland Phosphate Pty Ltd (QPL) will forgo any rights it has or may have under the convertible bond and security agreement and will receive in priority to all other creditors, other than priority creditors within the meaning of section 556 of the *Corporations Act 2001* (Cth), from the proceeds of the sale of the Paradise shares:

(A) the funds actually provided to Legend by or on behalf of QPL ($400,000);

(B) interest at the current penalty interest rate under the *Penalty Interest Rates Act 1983* (Vic) (being 10%) from the date of the advance of each tranche of the $400,000 until the date of repayment; and

(C) costs of the receivership capped at $40,000;

(iii) QPL, Sholom Feldman and Pnina Feldman will agree not to challenge the intercompany loan position between Legend and Paradise;

(iv) QPL, Sholom Feldman and Pnina Feldman will give fresh undertakings in the form of the undertakings currently given to the Court (with any requisite amendments);

(v) the Proceeding be dismissed with no order as to costs and vacation of existing costs orders.

This offer will remain open until **5 pm 26 April 2017**, at which point it will expire.

While, as the judge noted,[3] the applicants' proposals expressly required a deed of settlement and releases, to which the Feldmans would be parties, the counter offer from the respondents made no such stipulation.

15 On 24 April 2017, an application made by the applicants (filed 12 April 2017) to vary the undertakings previously given by the Feldmans was heard by Randall AsJ. The variation sought was to enable the Feldmans, as directors of Paradise, to obtain a secured loan of $1 million from Queensland Bauxite Ltd (another company associated with them) for the purpose of funding legal and other expenses of Paradise. The application was refused.

16 On the following day, 25 April 2017, the applicants' solicitor sent an email to the respondents' solicitor in the following terms:

> We refer to your letter of 19 April 2017 attached to your email below.
>
> We are instructed to accept your clients' offer.
>
> We will correspondent [scil, correspond] with your firm tomorrow in respect to the agreed terms.

17 On the morning of the following day, 26 April 2017, the solicitor for the respondents (Ms Bell) telephoned the solicitor for the applicants (Mr Roberts). Ms Bell and Mr Roberts gave evidence before the judge and were each cross-examined. From their evidence, it appears that their recollections of what occurred in this telephone conversation, and their recollections of what occurred in a second telephone conversation subsequent to an email sent by Mr Roberts to Ms Bell, are different. In summary, Ms Bell's position on 26 April 2017 was (and the respondents' position is) that a deed of settlement was necessary before a concluded and binding agreement came into existence. On the other hand, Mr Roberts' position was (and the applicants' position is) that the exchange of emails produced a concluded and binding agreement. Notwithstanding the existence of a concluded and binding agreement, Mr Roberts, however, participated in discussions with Ms Bell about a deed of settlement and its terms.

The hearing on 1 May 2017

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[3] Reasons [11].

18 As we have already noted, the trial of the proceeding was due to commence on 1 May 2017. On 27 April 2017, the liquidators filed a summons in which they sought a declaration that the proceeding had not been settled on 25 April 2017, and that the proceeding remained extant. Because of the urgency of the matter, the liquidators' summons was fixed for hearing before the Duty Judge in the Commercial Court (Judd J) on the day the trial was due to commence before Randall AsJ (1 May 2017).

19 On 1 May 2017, Judd J proceeded to hear the liquidators' summons. As we have already said, during the course of the hearing, both Mr Roberts and Ms Bell gave evidence and were cross-examined. The judge delivered his reasons for judgment and made the declaration that is the subject of the application in this Court at the conclusion of the hearing on 1 May 2017.

The judge's reasons

20 The judge commenced his reasons for judgment by noting that the application was urgent and that the requirement for an urgent disposition '[did] not permit detailed reasons that might ordinarily attend the resolution of such a dispute'.[4]

21 After setting out the relevant background of the dispute, the judge noted that the principle to be applied was not in dispute, and that the 'decisive issue' was 'the intention of the parties, objectively ascertained by the language they have employed in light of the surrounding circumstances'.[5]

22 The judge then proceeded to analyse the competing contentions about whether a binding agreement had in fact been entered into. In determining that no concluded agreement had been entered into, the judge said:

> I do not regard the imminent trial as determinative of the purpose of the plaintiffs' offer conveyed to the defendants. The imminent trial was a contextual factor that would, in the absence of some accommodation between the parties, and from the court, tend to require expedition if an agreement was to be executed within a few days. The defendants were no doubt anxious to avoid the cost and inconvenience of preparation for a trial that could be avoided. Their subjective concerns and

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4 Ibid [2].

5 Ibid [22].

aspirations do not, of course, inform the question whether a concluded agreement existed by reason of Mr Roberts' responding email to terminate the litigation forthwith.

The email exchange between the parties was not merely bringing a proceeding to an end. It was not as if the email exchange was terminating a claim, as between ordinary litigants, for a debt or for damages. The liquidators are not in the same position as private litigants, who might agree to sell or transfer an asset as part of a settlement. Liquidators are officers of the court, and subject to statutory duties. The orders sought by them in the course of the liquidation of Legend, were sought in a proceeding brought on behalf of creditors. Any agreement for the sale of shares, and a sale process, would require the approval of the committee of creditors or the court. It is not to the point to contend that such approval may be granted *nunc pro tunc*. What is important is that the defendants would reasonably have understood, and anticipated such a requirement, having regard to the role of the liquidators and the nature of the proceeding.

Furthermore, the plaintiffs' offer was in the nature of a counter offer, responding to an offer which included an express stipulation for a deed of settlement and releases. It would go without saying that directors (and the defendants) would have expected, and I conclude did expect, a deed of settlement to include formal releases. The defendants would not reasonably have interpreted the plaintiffs' offer to involve termination of the proceedings before formal releases were exchanged.

The plaintiffs' proposal for a sale of Legend's shares in Paradise 'in an open market process' would necessarily involve a sale regime to ensure that the liquidators were, and were seen to be, properly discharging statutory duties. The terms upon which Queensland Phosphate would forego any rights it had under the transaction documents, and receive some priority, would require further elaboration to ensure that the objective set out in the letter of 19 April 2017 was achieved. The same may be said of the requirements that the Feldmans and Queensland Phosphate not challenge intercompany loan positions. The undertakings that had been given would require adjustment, depending upon the performance of other obligations, the timing of any sale and such matters. In my view, a reasonable person in the position of the defendants would have understood that the offer contained in the letter was framed in broad principle, absent the necessary detail both parties would reasonably expect in the context of the proceeding brought by liquidators.

I have no doubt that the defendants, through their solicitor, understood that the liquidators were not proposing, upon acceptance of their offer, to abandon their proceeding without an executed deed of settlement. Thus, I would construe the words of Mr Roberts, in his email of 25 April 2017, when he accepted the offer, to acknowledge that more detailed terms were necessary before a final settlement was achieved. He concluded with the words 'we will correspond with your firm tomorrow in respect of the agreed terms'. He knew, at that time, that further negotiation was necessary.

The question whether, or at what point, a contract is complete does not depend upon what the parties themselves may think. Having regard to the text of the email exchange between the parties, the context in which that exchange took place, and the purpose of the proposed settlement (which was to resolve a wide range of issues involving the discharge by the liquidators of their statutory duties, with corresponding and profound consequence for the defendants and their directors) I am persuaded that the parties did not intend that, as a consequence of the mere exchange of emails, the proceedings were to be immediately terminated in the absence of a formal deed of settlement executed by all parties.[6]

The issues in this Court

23 The application for leave to appeal, and the appeal, proceeded on the basis of a single proposed ground of appeal. As reformulated in argument, the applicants' ground of appeal was in the following terms:

> The primary judge erred in concluding that the parties intended that the correspondence constituted by a letter from Arnold Bloch Leibler (ABL) to Judd Commercial Lawyers (JCL) dated 19 April 2017 as accepted by a response from JCL to ABL dated 25 April 2017 would not of itself constitute an immediately enforceable agreement, but instead, the parties intended that any enforceable agreement between them was subject to the parties further

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[6] Ibid [25]–[30].

agreeing on the terms of a formal Deed of Settlement which was intended to embody inter alia the provisions contained in the ABL letter of 19 April 2017.

24 In this Court, the respondents submitted that the judge did not err in the way alleged in the applicants' ground of appeal. Moreover, by a notice of contention, the respondents contended that the order made at first instance should be affirmed because, in addition to the matters found by the judge to require further elaboration,[7] 'the following matters also required further elaboration':

(a) what releases would be given by the parties to the proceeding and to whom;

(b) what releases would be given by persons not party to the proceeding (Legend, Mr Feldman and Mrs Feldman) and to whom;

(c) when releases were to be given (immediately upon execution or upon completion of the sale process and the making of the payments contemplated);

(d) how the costs of Paradise were to be met in the period prior to sale of Legend's shares in Paradise;

(e) who was to pay the balance of the amounts owed to the receiver and manager of Paradise and the receiver of Legend's shares in Paradise, and the receiver's solicitors, alternatively, who was to obtain a release from the receiver and his solicitors;

(f) what was to happen with the share transfer form for the transfer of Legend's shares in Paradise to Queensland Phosphate, which was being held in escrow, and when that was to occur relative to the sale process;

(g) the removal of, and timing for the removal of, Queensland Phosphate's entry on the Personal Property Securities Register;

(h) how long the liquidators would have to sell the shares in Paradise and what was to occur if no sale was concluded; and

(i) when, relative to the sale process, the proceeding was to be dismissed.

The applicants' contentions

25 The applicants submitted that there was a completed enforceable agreement when Arnold Bloch Leibler's letter of 19 April 2017 was accepted on 25 April 2017, and that the judge was wrong to hold otherwise. The letter was a formal offer that contained the essential terms of a proposed agreement between the parties, and was accepted as such by the applicants. Upon its acceptance, nothing remained to be agreed. Moreover, the text of the

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7 Ibid [28].

letter supported the proposition that it contained an offer that could be accepted by a particular time, after which the offer would expire — indicating that acceptance of the offer would give rise then and there to a concluded binding agreement.

26 As to the judge's reasoning for holding to the contrary, while the applicants accepted during oral argument before this Court that any agreement for the sale of Paradise's shares would require the approval of the committee of creditors or the Court,[8] they contended that this fact was of no moment. Upon receipt of the 19 April letter, the applicants were entitled to assume that the liquidators (respondents) already had approval from the creditors, or that approval would be obtained and that the requirement for such approval was, at most, a condition subsequent.

27 The applicants criticised the judge's proposition that it would 'go without saying' that the applicants and their directors would have expected, and did expect, a deed of settlement that included formal releases.[9] The applicants submitted that there was no basis for this conclusion. Moreover, they submitted that the judge was wrong to base such a conclusion on the fact that the terms of earlier offers that had been rejected contained provisions for deeds of settlement and releases. On one view, the rejection of offers containing provisions for deeds of settlement and releases, and the making of a counter offer with no such provisions, told against a conclusion that acceptance of the 19 April counter offer carried with it any requirement for a deed of settlement and releases. At best, as the applicants put it, the fact that there was provision for deeds of settlement and releases in the earlier rejected offers, which provision was not expressly made in the 19 April letter, was neutral on the question of whether a deed of settlement was required to be entered into before a binding agreement was concluded.

28 So far as the judge concluded that the mechanism of sale of the shares in Paradise 'in an open market process' had not been agreed,[10] the applicants submitted that the process had been sufficiently agreed by the use of the words 'open market process', words that are

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8 See Reasons [26], see [22] above and see s 477(2B) of the *Corporations Act 2001*.

9 See Reasons [27], see [22] above.

10 See Reasons [28], see [22] above.

understood in the context of the obligations relating to the exercise of a power of sale given by s 420A of the *Corporations Act 2001*.

29 As to the judge's observation that the undertakings previously given to the Court 'would require adjustment',[11] the applicants submitted that all that would be required was the replacement of the introductory words: 'Until the final determination of these proceedings or until released from this undertaking by the Court' with words to the effect 'Until the completion of the sale process'. It was submitted that this was not a matter that required further agreement: 'reasonableness' was said to be the answer to the point.

30 In relation to each of the respondents' paragraphs of the notice of contention, the applicants submitted that when the matters were looked at individually, they were of little or no moment. In summary, the applicants responded to each paragraph of the notice of contention by saying that the issue identified in the paragraph was dealt with by the doctrines of merger and *res judicata*; alternatively, that the issue or problem was one that, at best, was a matter for the applicants (or the Feldmans), and not the respondents; alternatively, was covered by the terms of the deed of appointment of the Receiver; alternatively, was covered by a relevant legislative provision (for example, s 420A of the *Corporations Act*); alternatively, was not a matter that required any further agreement. In particular, it was submitted that the issue of releases to be given by the parties was dealt with by the doctrines of merger and *res judicata*. The question of releases to be given to non-parties was dealt with by the simple assertion that 'none had been asked for and none would be given'. Paradise's expenses during the period prior to the sale of Legend's shares in Paradise were an issue for the applicants, not the respondents. Any amount that might be owed to the Receiver was covered by the deed that appointed him. Nothing was to happen to the share transfer form for the transfer of Legend's shares in Paradise to Queensland Phosphate because the sale was at an end. The *Corporations Act* covered the issue of how long the liquidators would have to sell the shares in Paradise, and the proceeding brought by the respondents was to be dismissed either immediately or at the conclusion of the sale process.

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11 Ibid.

31 The applicants submitted that when one examined each of the matters relied upon by the judge, or raised in the notice of contention, none of them was an impediment to a conclusion that there had been a concluded and binding agreement entered into on 25 April 2017.

The submissions of the respondents

32 In their submissions, the respondents supported the reasoning of the judge, and in particular the judge's findings and conclusions at Reasons [26]–[30], as set out above.[12]

33 The respondents disputed the applicants' contentions that each of the topics the judge identified in his reasons, and the additional topics the respondents identified in their notice of contention, were matters about which no further agreement was required. Moreover, the respondents submitted that, even if the applicants could provide an answer in respect of an individual matter that had not been the subject of agreement so as to diminish the significance of that matter, the proper approach to the question of whether there was an enforceable and concluded agreement required all of the identified matters to be looked at in total. In support of that submission, the respondents relied upon *Australian Broadcasting Corporation v*

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[12] See [22] above.

XIVth Commonwealth Games Ltd[13] and *Sagacious Procurement Pty Ltd v Symbion Health Ltd*.[14]

34 The respondents submitted that, not only did the email exchange between the solicitors fail to deal with so many issues about which agreement was required so as to suggest that in fact no concluded agreement had been reached, a number of the matters they identified were, of themselves, of such significance as to compel that conclusion. By way of example, the respondents referred to the detailed discussion, deposed to by Ms Bell (and about which there was no cross-examination), between Ms Bell and Mr Roberts on the issues of whether Mr Feldman and Mrs Feldman would be indemnified if they remained directors of Paradise, whether Mr Feldman and Mrs Feldman would remain directors of Paradise and, in the event that Mr Feldman and Mrs Feldman did not remain directors of Paradise, the difficulty that might ensue in obtaining the consent of another person to be appointed a director, and whether a provisional liquidator would otherwise need to be appointed to Paradise.

35 Next, as a matter of text, the respondents pointed to the use of the words 'our clients are willing to settle the proceeding' in the 19 April 2017 letter as indicating a willingness rather than making an offer that was capable of being accepted so as to form a binding agreement.

36 Finally, the respondents submitted that the statement in the last line of the 25 April email, that the applicant's solicitors would correspond the next day 'in respect to the agreed terms' was indicative that no concluded agreement had been reached.

Analysis

37 The legal principles to be applied in determining whether the exchange of emails between the solicitors constituted an immediately binding agreement on the parties were not in dispute in this case. First, the question of whether there was a binding agreement is one

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13 (1988) 18 NSWLR 540, 548 ('*Australian Broadcasting Corporation*').

14 [2008] NSWCA 149 [73] ('*Sagacious*').

that falls 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. If an essential term was not agreed, then the 'agreement' is incomplete and did not give rise to an enforceable contract. Moreover, the existence of matters of importance on which the parties have not reached consensus will render it less likely that they intended immediately to be bound before the execution of a formal document.[15] Secondly, in determining whether a binding contract was in fact formed, regard may be had to the parties' subsequent communications: (1) in order to see what was important or essential to the transaction; (2) as admissions; and (3) as probative of the parties' contractual intention.[16]

38 In the present case, as the parties' submissions identify, there are competing considerations as to whether the exchange of emails resulted in a concluded binding agreement without the need for a deed of settlement or formal releases.

39 In favour of a conclusion that there was a completed and binding agreement is the fact that the counter offer in the letter of 19 April is expressed to be an 'offer' with a time at which point it would 'expire'. Without reference to context or subsequent conduct, one might readily infer that the offer made in the 19 April letter was capable of being accepted before the time on which it expired and that such an acceptance would bring about a concluded and binding agreement.

40 While the judge placed some reliance upon the fact that the rejected offers of 10 April contained express references to deeds of settlement and releases, as showing that that was the basis upon which negotiations proceeded, we take leave to doubt the significance of this point.[17] One could almost as easily have said that because the earlier offers containing those references had been rejected and those references not repeated in the letter of 19 April 2017, deeds of settlement and releases had been ruled out by the parties.

41 Similarly, we do not think that the last line of the 25 April 2017 email ('We will

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15 *Sagacious* [2008] NSWCA 149 [73].

16 Ibid [99]–[106]; *Nurisvan Investment Ltd v Anyoption Holdings Ltd* [2017] VSCA 141 [77].

17 Cf Reasons [27], see [22] above.

correspondent [scil, correspond] with your firm tomorrow in respect of the agreed terms') is of much assistance in the resolution of the present issue. On one view, the statement might suggest that there was no concluded and binding agreement. On another view, because the 25 April email was sent on a public holiday, the applicants' solicitor may have been saying no more than a letter about the terms of the orders that might be sought from the Court, or the like, would be sent on the next business day.

42 In our view, it is ultimately the context and subsequent communications between the solicitors that demonstrates that the exchange of emails on 19 and 25 April did not give rise to a concluded binding agreement. The subject of the litigation and dispute between the parties was complex[18] and required a number of matters to be worked out. The matters of most significance were the payment of Paradise's expenses while the sale process was occurring and the question of fees that might be owed to the Receiver and which might be recoverable out of Paradise's assets.

43 Without an agreement about which party was responsible for the payment of Paradise's ongoing expenses, there were risks that expenses might not be paid and that Paradise's assets, and value, might be diminished by the loss of phosphate tenements in respect of which relevant fees were not paid. Further, the discussion between Ms Bell and Mr Roberts about indemnities for the Feldmans, whether the Feldmans would remain directors of Paradise, the unlikelihood of obtaining the consent of another person to be a director and the possible requirement for the appointment of a provisional liquidator of Paradise were all important and relevant matters affecting Paradise and the value of its shares. Similarly, the issue of what amounts might be recoverable by the Receiver (from Paradise) in excess of the amount sought to be capped in the 19 April letter, had the capacity to bear on the value of Paradise shares.[19] The failure of the 19 April letter to make reference to these important issues tells substantially in favour of a conclusion that the exchange of emails between the parties' solicitors did not give rise to a complete and binding agreement.

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18 The terms of, and detail contained in, the Bond Deed and the Security Deed demonstrate the complexity of the matter.

19 The total amount owing to the Receiver and Manager of Paradise is $248,969.85, and the amount owing to non-receivership creditors is $403,165.50.

44 The matter of mutual releases, and in particular the timing and extent thereof, and the parties to be bound, was also a matter that the parties would have regarded (as indeed they did) as a matter that needed to be dealt with as part of any settlement agreement given the nature of the proceeding. Another matter of importance, given the nature of the proceeding, was the position of the liquidators. What the parties would ordinarily have expected or regarded as a matter that needed to be addressed, as part of any settlement agreement, was the position of the liquidators in the event that any agreement for the sale of the Legend's shares in Paradise would only effectively be completed more than three months after the agreement was entered into.[20] Although in such a case leave *nunc pro tunc* is often given, such approval is not a rubber stamp and is not to be assumed. This possibility together with the prospect of a 'no sale' needed to be and would have expected to have been addressed. In our opinion it is not a satisfactory or sufficient answer to say that this eventuality or possibility was a condition subsequent.

45 Further, there is the question as to the timing of the dismissal of the proceeding, a not insignificant matter given the executory nature of the intended settlement agreement. The uncertainty and potential difficulties are apparent. Again, the parties would ordinarily have regarded or expected this to be a matter that needed to be dealt with as part of the settlement agreement.

46 In *Australian Broadcasting Corporation*,[21] Gleeson CJ said:

> Nevertheless, in the ordinary case, as a matter of fact and common sense, other things being equal, the more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a court will be to conclude that they had the requisite contractual intention.

47 All of the matters referred to are important matters of context when assessing whether the parties intended to be immediately bound by that which they had agreed. In our opinion, the parties regarded or would ordinarily have expected these matters to be covered by their settlement agreement. We ask these rhetorical questions: (1) Can it be said that by resolving

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20 As mentioned above, in such event either the leave of the Court under s 477(2B) of the *Corporations Act* or the approval of the committee of inspection or of a resolution of the creditors is required, as adverted to by the judge and ultimately accepted by the applicants.

21 (1988) 18 NSWLR 540, 548. (Hope and Mahoney JJA agreed with the Chief Justice).

the matters that the parties did resolve — clearly fundamental matters in dispute — they intended to regulate by an independent further agreement all of the other important matters referred to above? (2) Did the parties intend that, in the absence of such an independent further agreement, they would nonetheless be bound by that which they had agreed on 25 April 2017 and would leave the law, with all the related uncertainty, to deal with these further matters? It is unlikely. It is more likely that the parties intended to resolve these matters as part of a binding settlement agreement to be arrived at through subsequent negotiation.

48 Although not free from difficulty, we consider that, in the final analysis, the nature of the proceeding, the proposed settlement, and the discussions, correspondence, and interlocutory steps are strongly suggestive of an expectation that, despite agreement as to the basic structure of the settlement, all matters would ultimately be 'wrapped up' in a written document executed by all necessary parties (which included relevant non-parties) and that until this was done there was no binding settlement agreement.

49 For these reasons, the judge was correct when he ruled, and declared, that the proceeding did not settle on 25 April 2017 and that it remained extant.

Conclusion

50 The question of whether the email exchange of 19 and 25 April 2017 gave rise to a concluded and binding agreement was plainly arguable. Accordingly, there should be a grant of leave to appeal. The appeal, however, must be dismissed.

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