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Q&S DEVELOPER UPDATE

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IS A PUT AND CALL OPTION AGREEMENT A CONTRACT?

Developers will be aware that a put and call option agreement is an agreement whereby one party (the seller/grantor) grants to another party (the buyer/grantee) a right for the grantee to call for a contract to be entered into between the grantor and the grantee (the call option) and in the absence of the call option being exercised the grantor can put/require a contract to be entered into between the grantor and the grantee (the put option).

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Developers may recall that in 2006 the Queensland Court of Appeal held in the case of Mark Bain Constructions Pty Ltd v Barling that put and call option agreements were to be regarded as a "relevant contract" as defined in the Property Agents and Motor Dealers Act 2000 (PAMDA). Thereby the consumer protection requirements concerning the attachment of a Form 30c warning statement to the front of the contract and the procedures required to be followed in the formation of a contract under that Act had to be followed in respect of a put and call option.

The Supreme Court has recently revisited the issue in the case of Vale No. 1 Pty Ltd v Delorain Pty Ltd. In this case the grantor (Delorain) sought to exercise a put option with the grantee (Vale No. 1 Pty Ltd) but Vale No. 1 Pty Ltd sought to avoid its liability to purchase the lot on the basis that the consumer protection provisions of PAMDA had not been complied with.

The issue for the court was whether the put and call option agreement was a relevant contract within the meaning of PAMDA. If the answer was that it was a relevant contract then the consumer protection provisions of PAMDA would apply including the right for Vale No. 1 Pty Ltd to terminate.

The Supreme Court considered the Mark Bain Constructions case as well as a number of other cases. It distinguished this case from the Mark Bain Constructions case on the basis that in this case the put and call option agreement provided that Vale No. 1 Pty Ltd as grantee could nominate a third party to exercise the call option in place of Vale No. 1 Pty Ltd.

The court held that the substance of the put and call option agreement was to provide stock for Vale No. 1 Pty Ltd to market to third parties and that this was in the contemplation of the parties when they entered into the arrangement. This view was reinforced by the fact that the ultimate buyer was not clearly identified in the put and call option agreement and would not be known until the call option was exercised.

As a result, put and call option agreements which contain nomination provisions do not constitute a valid and binding contract for sale but merely confer certain rights to the parties to exercise an option to create a contract in defined circumstances. Therefore, depending on the terms of the put and call option agreement, grantee/buyers under put and call option agreements who believe that they may be able get out of a put and call option agreement using a technicality under PAMDA by virtue of the Mark Bain Constructions case may no longer be able to do so .

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If you would like to ask any question about this or any other similar issue Duncan may be contacted on 3221 1838 between 8.00am to 5.00pm Monday to Friday or email dmurdoch@quinnscattini.com.au

This update is for your information and interest only. It is not intended to be comprehensive, and it **does not constitute and must not be relied on as legal advice**. You must seek specific advice tailored to your circumstances.

