



Agreement vs. Deed

Authors: Tim Manefield and David Lipworth

The recent Queensland Supreme Court case of *400 George Street (Qld) Pty Limited & Ors v. BG International Limited* [2010] QSC 66 (16 March 2010) has provided us with a reminder of some fundamental contractual principles.

As indicated in the case, a party executing a document as a deed will not be able to withdraw from its commitments under that document, even prior to execution by the counterparty, without equitable relief from the court.

Whether an instrument is a deed or an agreement will depend on the intentions of the parties. If there is an intention to create a deed, merely including execution blocks for a deed, and describing the document as a deed, may not be sufficient – the provisions of the document, including its opening statements, must be consistent with the language of a deed.

It is a fundamental element of a contractual agreement that consideration be provided by each party to the other. In contrast, a deed can be used to create legally binding obligations where there is no consideration. Therefore, a deed should not refer to the existence of consideration.

The facts

The case involved negotiations for a major commercial lease between sophisticated commercial parties, who were being advised by top tier Australian law firms. The plaintiffs were constructing a new commercial office building and negotiated an Agreement for Lease with the defendant for a lease of four floors. The defendant executed and returned to the plaintiffs an undated copy of the Agreement for Lease, but the plaintiffs took a number of weeks to execute their counterparts. The defendant changed its mind about leasing the property and purported to withdraw from the Agreement for Lease before it was executed by the plaintiffs. The plaintiffs argued that the defendant became unilaterally bound upon executing the Agreement for Lease as a deed and so was not able to withdraw from the transaction.

The Agreement for Lease was expressed to be “Executed as a deed” on its signature page and had execution blocks

appropriate for a deed, but otherwise contained language ordinarily associated with agreements. Relevantly, there was no written evidence as to why that form of signature page was included or that it was agreed by the defendant.

What’s the significance of the distinction?

McMurdo J explained the significance of the difference between an agreement and a deed as follows:

“A deed is very different from a contract ... [a] contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered.”

A document may be executed as a deed but be delivered as an escrow, that is to say upon the condition that the obligations of the maker of the document are not to be performed until some condition is satisfied ... But even in such a case, the party which has executed the instrument cannot withdraw pending the satisfaction of the condition.”

McMurdo J explained that the only way in which a party that has executed a deed may withdraw from its commitments under the deed would be to obtain equitable relief from the court due to unreasonable delay in the satisfaction of a condition (e.g. if the counterparty takes an unreasonable time to execute the deed).

Commonly, a deed is used by parties:

- where there is some doubt as to whether there is suitable ‘consideration’ being provided for the transaction
- where the document includes a power of attorney that authorises the attorney to execute a deed on behalf of the principal
- where legislative requirements call for the document to be executed in the form of a deed, and/or
- in order to enjoy the longer statutory limitation period that applies for actions arising under a deed. The statutory limitation period for an action in contract is

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six years from the date on which the cause of action accrued, whereas for a deed it is 12 years.

Agreement or deed?

According to the court:

"The question whether an instrument under seal is a deed depends on whether it was intended to operate as the deed of the person executing it, that is whether it was intended to be immediately binding on that person in the sense that, whether it was intended to operate immediately or subject to a condition, it could not be recalled by that person."

Factors that were considered

In *400 George Street*, the court found that the document was not a deed even though it was expressed to be "Executed as a deed" on its signature page and had execution blocks appropriate for a deed. Rather, McMurdo J examined the surrounding circumstances and took into account the following:

- An earlier heads of agreement between the parties provided that "All documentation is subject to a mutually agreed legal document by both parties". McMurdo J viewed this as evidence that the defendant intended only to be bound when the plaintiffs executed, rather than independently bound when it executed the document.
- The defendant provided its counterpart to the plaintiffs undated. Particularly because several of the obligations in the document were linked to "the date of
- this Agreement", McMurdo J similarly viewed this as evidence that the defendant did not intend to become immediately bound upon its execution of the document.

- The document did not use the kind of language ordinarily associated with deeds (e.g. it did not describe its terms as "covenants"). The document used the words "this agreement" throughout its body and contained an opening statement as follows: *"in consideration of, among other things, the mutual promises contained in this agreement"*.
- There was no need for the document to be a deed to overcome any lack of consideration.
- There was no evidence in the surrounding negotiations or correspondence that the parties had consciously agreed that the document should be a deed. Had it been intended to use a deed, the defendant would most likely have specified conditions to its obligations under the deed becoming binding.

For further information please contact your usual PricewaterhouseCoopers adviser or:

Tim Manefield

Director

+61 (2) 8266 2939

tim.manefield@au.pwc.com