DISTRICT COURT OF QUEENSLAND

CITATION:	*Motionx Pty Ltd V Evok3d.com Pty Ltd* [2022] QDC 124
PARTIES:	**MOTIONX PTY LTD** Applicant **v** **EVOK3D.COM PTY LTD** Respondent
FILE NO/S:	TD 927/2022
DIVISION:	Civil
DELIVERED ON:	19 May 2022 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	19 May 2022
JUDGE:	Barlow QC DCJ
ORDERS:	**1. It is declared that a binding contract was entered into between the Applicant and the Respondent on 27 October 2021 when the Applicant accepted, in writing, the Respondent's written offer dated 26 October 2021 (the Settlement Agreement).** **2. It is declared that the Respondent is in breach of the Settlement Agreement.** **3. The respondent pay to the Applicant any loss and damage suffered by the Applicant as a consequence of the Respondent's breach of the Settlement Agreement, such loss and damage to be assessed.** **4. This proceeding be placed on the Commercial List.** **5. The Respondent pay the Applicant's costs of the application to date.** **6. Draft directions for the matter to proceed to assessment be provided to his Honour Judge Barlow's associate by 4:00pm on 25 May 2022.**

CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – an offer and its acceptance were conducted via email – whether the proposal of a date for settlement in the acceptance email was a new proposed term – whether a contract was formed upon that acceptance – whether time was, or was later made, of the essence – whether failure to settle by the specified date was a breach of contract *Clive v Beaumont* [1848] 1 De G & Sm 397 *Costello v Loulakas* [1938] St R Qd 267 *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251 *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 621 *Toohey v Golder* [2021] QSC 277
COUNSEL:	J Faulkner for the applicant J K Meredith for the respondent
SOLICITORS:	HWL Litigation for the applicant Macpherson Kelley for the respondent

[1] In about June 2019 the parties to this proceeding entered into a contract by which the applicant purchased from the respondent a 3D printer. The printer was designed to make podiatry orthotic devices. Over the months following that purchase the applicant became more and more dissatisfied with the printer and contended that it did not operate properly and the respondent had breached and continued to breach its obligations under the contract. The parties negotiated with each other for some time. Those negotiations ultimately led to their solicitors exchanging the following correspondence.

[2] On 26 October 2021 the respondent's solicitor wrote to the applicant's solicitor an email in which the respondent's solicitor said that the respondent did not accept an earlier offer that had been made by the applicant. The solicitor went on to say:

> However, our client is prepared to make a further counter offer on the following basis.
>
> - Our client will novate or pay out the financed amount on the printer. Please note that this amount must be tied to the outstanding finance as at the date of any settlement. The concept that our client must pay an amount greater than the outstanding finance whilst your client continues to own and generate revenue from the printer cannot be accepted. In the interests of transparency, we don't anticipate any alternative position being acceptable to our client.
> - Our client will refund in cash the balance of the support agreement which expires in June next year and as calculated from the date of any settlement. As of today that amount is approximately $8,800.
> - Our client will purchase any saleable and merchantable consumables that your client holds as at the date of any settlement.
> - Our client will take back the printer from your client.
> - Our client will make a cash payment to your client of $10,000. Please note this part of our clients offer is strictly on the basis that the parties expeditiously enter into and sign settlement terms to reflect the above. If further negotiations are required, then we are instructed that any cash payment made to your client will be $10,000 less incurred legal fees from the date of this offer.

[3] The following day the applicant's solicitor wrote an email to the respondent's solicitor, in which he said:

> I am instructed that my clients accept your client's offer.
>
> We propose that settlement occurs no later than 12 November 2021. Our clients are content to settle earlier if possible, otherwise we will request a payout figure from Medfin as at 12 November 2021.
>
> Please urgently forward a draft deed of release for our review and consideration.

[4] On 29 November 2021 the respondent's solicitor responded to that email, saying relevantly:

> Thanks for confirming.
>
> We will begin drafting terms of settlement for your review.
>
> In terms of timing for settlement, this likely depends on how quickly your client can procure a novation or assignment of the finance agreement, given that the payout figure will be tied to that date. Perhaps your client can make some early enquiries with Medfin now whilst we prepare the terms of settlement.

[5] Later that same day, indeed about an hour later, the applicant's solicitor responded saying:

> In terms of timing for settlement, please see attached payout from Medfin valid until 25 November 2021, consistent with your client's offer.

[6] The applicant contends, and seeks today a declaration, that the emails exchanged on 26 and 27 October resulted in a binding contract between the parties. The respondent contends that the proposal in the email of 27 October that settlement occur no later than 12 November 2021 was a new proposed term of the agreement being negotiated and therefore that email was a counteroffer that was never accepted.

[7] Over the next seven or eight weeks a number of further emails were exchanged between the parties. Of particular importance are the following. First, an email of 29 October in response to the last one that I have read, in which the respondent's solicitor said:

> Just to clarify, our client's offer was on the basis of refinancing the outstanding liability by way of an assignment or novation. Please send through the underlying agreement when available as this will deal with the ability for the agreement to be assigned or novated to our client.

[8] On 8 November 2021 the solicitors for the respective parties had a couple of telephone calls, in which the respondent's solicitor seemed to accept that it looked like the current agreement with the applicant's financier Medfin could not be assigned. He told the applicant's solicitor that his client was making arrangements on the finance side of things but could not give a fixed date for settlement just yet. His client wanted to keep the payout figure tied to the settlement date. It would be whatever it was upon the signing of the deed of settlement.

[9] In the second conversation the respondent's solicitor said that his client needed to make some arrangement with the manufacturer of the printer and doing that and getting finance could take a couple of weeks.

[10] Following that conversation, on 11 November 2021 the applicant's solicitor wrote to the respondent's solicitor, relevantly stating that the applicant wished to continue with the terms of the respondent's offer as accepted on 27 October 2021. It then went on:

> Based on the recent advice of your firm our clients are willing to vary the agreement as follows:
>
> (a) completion will be extended to 24 November 2021 and the parties otherwise comply with the agreement. In this regard our client's view is that 28 days from the date of acceptance of the offer is a reasonable amount of time within which to obtain finance, particularly given that the offer was initiated by your client; and
>
> (b) if your client is unable to complete the settlement on or before 24 November 2021, the date for completion will be extended to 12 December 2021 on the basis that your client will at settlement –

And then it sets out five requirements for settlement. It then went on:

> If your client is not agreeable to the above, please provide a draft deed as soon as possible reflecting the agreement. We confirm that our clients remain ready, willing and able to settle on the basis of the agreement.

[11] That was responded to by an email on 26 November 2021, in which the respondent's solicitors said that they did not agree that the terms of the 11 November email

constituted a binding variation to the offer, but the respondent was taking steps to obtain funding and those steps remained in progress.

[12] On 8 December 2021 the applicant's solicitor wrote to the respondent's solicitor, saying relevantly:

> Should your client fail to completely comply with the agreement entered into by the parties on 26 October 2021 by 18 December 2021, our clients shall:
>
> Commence proceedings against your client for specific performance or damages for breach of the agreement entered into by the parties on 26 October 2021; or
>
> Commence proceedings against your client and HP [that is Hewlett-Packard, the manufacturer of the machine] seeking damages for the substantive complaints in relation to the printer and misleading and deceptive conduct.

[13] The question, therefore, is whether the emails exchanged on 26 and 27 October 2021 constituted a binding contract, particularly whether the applicant's proposal in its email of 27 October that settlement occur no later than 12 November 2021 was a material qualification of its acceptance of the respondent's offer made on the previous day.

[14] In *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251, Bond J, with whom Fraser and Gotterson JJA agreed, said this about the relevant legal principles (at paragraphs 13 and 14 of his Honour's reasons):

> The application of the classical theory of contract formation requires a consideration of the terms of an alleged offer and the terms of the alleged acceptance. If the acceptance corresponds with the offer, then so long as the other requisite elements exist, namely intention to be legally bound, consideration and certainty, then a legally binding contract will, generally speaking, have been formed.
>
> A complication which sometimes arises is that the offer and acceptance analysis reveals that the parties contemplated a subsequent formal document, hence the *Masters v Cameron* classes of case. In such cases, the decisive consideration is an objective assessment of whether, as at the time in question, the parties intended to bind themselves to the terms of a particular contract, in advance of the creation of the formal document.
>
> (Footnotes omitted.)

[15] In *Toohey v Golder* [2021] QSC 277, Justice Bond said the following at paragraph 48:

> Whether or not a communication amounts to acceptance or rejection of an offer (including by means of a counter-offer) is to be determined by asking what a reasonable person in the position of the recipient of the communication would have understood from the terms of the communication, viewed in context.

[16] Really, those principles are not in dispute on this application. What is in dispute is the application of those principles to the correspondence between the parties. The applicant submits that this case is most identical in terms of its facts with a decision of the Vice Chancellor in Clive v Beaumont [1848] 1 De G & Sm 397; 63 ER 1121. In that case Mr Beaumont made an offer to take over a lease and to purchase fixtures and furniture to the amount of £100, to which Mr Clive responded by his solicitors that he accepted the terms proposed for his house and the solicitor went on to say, "We hope to give you possession by the half-quarter day."

[17] The Vice Chancellor said this, at page 403 of the report (page 1124 of the English Reports). He quoted, "We are instructed to accept the terms proposed by you in his letter for his house" and his Lordship went on:

> Now, if the letter had ended here, there certainly would have been a complete agreement, at least in my opinion. Then comes this expression, "We hope to give you possession by the half-quarter day." I am of opinion that these words were not intended to operate and did not operate as a qualification of the contract or a qualification of the acceptance but that, if they had operated as a qualification of the contract or a qualification of the acceptance, the circumstances which afterwards occurred were more than sufficient to do away with any possible effect that could be supposed to arise from it.

[18] The respondent distinguishes that case because the relevant statement was one of hope rather than a proposal. In this case the applicant proposed a settlement date, or the last day for settlement, and the respondent submits that the words, "Our clients are content to settle earlier if possible," implied the further words, "but not later." In other words, that the applicant was seeking to impose a settlement date on the respondent.

[19] The applicant contends that the real issue is whether that extra statement qualifies its acceptance, in which case it would be a new term proposed and therefore no contract was formed; or whether it is merely proposing a manner of effecting the agreed terms. Or, to put it in the words of the Full Court in *Costello v Loulakas* [1938] St R Qd 267 at 275 to 276, whether the same letter which purports, by its first few words, to amount to an unconditional agreement is, in fact, introducing a new term and so nullifies the suggested unconditional acceptance.

[20] The applicant notes that those words, which the respondent says amount to a qualification of the supposed unqualified acceptance of the respondent's offer, need to be viewed in the context of the offer itself, to which it responds. The first four bullet points of the offer did not state any date for settlement of the contract if the offer was accepted. The last bullet point offered to make a cash payment to the applicant strictly on the basis that:

> The parties expeditiously enter into and sign settlement terms to reflect the above. If further negotiations are required, then we are instructed that any cash payment will be $10,000 less incurred legal fees from the date of this offer.

[21] It is in that context, where the respondent appeared willing, indeed keen, to resolve their dispute promptly, that the applicant suggested that they settle by no later than 12 November 2021. The applicant submits that it was attempting to comply with the respondent's offer in making that proposal. The applicant also points to the subsequent correspondence from the respondent, particularly the email of 29 October in which the respondent's solicitor said:

> Thanks for confirming.
>
> We will begin drafting terms of settlement for you to review.

and went on to talk about the timing of settlement but did not agree to 12 November.

[22] The respondent says that the applicant was clearly proposing a fixed date for settlement, or a fixed last date for settlement in its letter and that that construction of its email was confirmed by subsequent emails from the applicant in which, for example, on 11 November 2021 the applicant's solicitors said, "Our clients are willing to vary the agreement as follows" and proposed completion dates of 24 November

2021 or, subject to further terms, 12 December 2021. The proposal to vary the agreement indicates that the applicant considered there to be an agreement which it was, in its benevolence, agreeing to vary as to the date for settlement. Similarly, on 24 November 2021 the applicant's solicitor wrote to the respondent's solicitors, noting that "Our client's extension of the date for completion expires today," which again indicates, in the respondent's submission, that the applicant considered the settlement date to be a crucial part of its acceptance of the respondent's offer and a qualification to that acceptance.

[23] In my view, the emails of 26 and 27 October 2021 constituted a binding contract between the parties to settle their dispute on the terms set out in the email on 26 October. In the context of that last bullet point, which effectively sought urgency in completing the agreement, the response on 27 October was to suggest a relatively short period until settlement, and even shorter if the respondent wished.

[24] In my view, the start of that letter made it very clear that the applicant was accepting the respondent's offer without qualification, as no settlement date had been a term of the offer. It was accepted and the parties then needed to agree on a settlement date or, if they could not agree, settlement would take place a reasonable time thereafter. In my view, the reference to the applicant being content to settle earlier if possible did not imply that a later date would not be acceptable.

[25] It seems to me also that, in the response to that email, the respondent's solicitor accepted and knew that there was a contract on foot with the settlement date to be agreed later, because he simply said, "Thanks for confirming" and then went on to talk about drafting the terms of settlement and what might be the date for settlement. It was not necessarily the respondent's obligation to draft the terms of settlement, but the respondent did wish the parties expeditiously to enter into and sign settlement terms, "to reflect the above." The terms of the offer and that passage make it clear, in my view, that the settlement offer, if accepted, would result in a binding contract which was then to be reflected in a written terms of settlement that would be signed by the parties.

[26] Upon acceptance without an agreed settlement date, the parties were both obliged to cooperate to settle within a reasonable time. What is a reasonable time is a question of fact that is decided in all the circumstances. One circumstance was, in fact, the respondent's incentive and expressed desire to settle soon. When it did not agree to settle soon, the applicant proposed later dates for settlement, to which it referred as extensions, and in one sense they were extensions to the earlier proposed dates.

[27] The applicant did not, however, purport unilaterally to vary the agreement in any way except by its offer of 11 November, by which it did offer to vary the agreement. The terms of the offer would, if accepted, have been a variation because, instead of performance of the contract within a reasonable time in the absence of an agreed date, the applicant proposed two alternative fixed dates for settlement and additional terms for completion. The respondent did not accept that offer, so the original contract remained on foot, as the applicant's solicitor stated at the end of that email. Therefore, the contract remained on foot on the terms set out in the respondent's solicitor's email of 26 October.

[28] In its originating application the applicant seeks a declaration that a binding contract was entered into between the parties when the applicant accepted the respondent's

written offer in those two emails. It seems to me that it would be appropriate to make a declaration to that effect.

[29] In paragraph 2 of the originating application the applicant also seeks a declaration that the respondent has fundamentally breached the contract and thereby repudiated it by failing and expressly refusing to perform any of its obligations under the contract. So that is the next question for me to determine.

[30] One matter upon which the applicant relies as a breach of the contract by the respondent is that, in the contract, it said that it would novate or pay out the applicant's contract with its financier, Medfin. Very shortly thereafter it appears to have considered that to mean that the applicant would arrange for the agreement to be novated or assigned to the respondent. Such things were not agreed. The respondent seemed also not to agree, or not to wish, to simply pay out the applicant's finance agreement.

[31] The applicant did ascertain from Medfin that Medfin would not novate the agreement and ascertained a payout figure. That was in accordance with the agreement. If it could not be novated, then the respondent was to pay it out. The respondent then sought to impose a term that settlement was subject to it obtaining finance in order to pay out the agreement, but that was not a term of the agreement and the applicant was entitled to assist on completion without taking it into account or waiting for the respondent to obtain any external finance to pay its obligations under the agreement.

[32] When an agreement is to be completed within a reasonable time, as I said, what is reasonable is a question of fact. As the learned author of *Contract Law in Australia*, Professor Carter, said in the 2018 edition of his work:

> Whether a reasonable time has expired is determined at the time when performance is alleged to be due. For example, if a contract for the sale of goods states no time for delivery, a reasonable time expires when, in the actual circumstances, the seller has had sufficient time to make delivery. Because the period is not to be regarded as fixed at the moment the contract is agreed, matters such as the nature of the goods, weather conditions and so on may be relevant.

[33] In this case, the circumstances of the long negotiations and dispute between the parties and their desire to resolve the dispute promptly are relevant factors in determining what was a reasonable time within which to settle this contract. The respondent's difficulties in obtaining finance are not relevant to that question, as they did not make finance a condition of the agreement. However, I accept that, in commercial negotiations of this type and transactions of this type, a party might anticipate that a financier, if any, of the other party may need a few weeks at least to be asked and to agree to provide finance.

[34] In that respect, whether or not the respondent had obtained finance has some relevance to the question of what was a reasonable time, but it does not mean that the reasonable time was whatever time it took the respondent to obtain finance, particularly in the circumstance of a contract that was not subject to finance.

[35] Of course, even if a reasonable time had passed at any stage, a failure to settle within such a time is not itself a breach of the contract because time is not of the essence unless it is made so by a term of the contract or the circumstances of the contract or

by one party choosing at an appropriate stage to make time of the essence. As Professor Carter said at paragraphs [30-53] and [30-54] of his work:

> The general rule where time is not of the essence is that the promisor's failure to perform on time does not give rise to a right to terminate unless the promisee first serves a notice requiring performance within a reasonable time.

[36] He went on:

> Delay may be unreasonable (1) in the sense that it evidences a repudiation of an obligation by the promisor or (2) because of the serious adverse consequences for the promisee.
>
> In (1), general principles of repudiation must be applied. For example, delay may evidence a refusal to perform the contract. Whether delay is unreasonable is a question of fact.

[37] I have referred previously to the applicant's solicitors' email of 8 December 2021, in which the applicant's solicitors said, that if the respondent failed to comply with the agreement by 18 December 2021, the applicant would commence proceedings either for specific performance and damages or for damages alone and the applicant reserved all its rights. In my view, by that letter the applicant specified a date within a reasonable time for completion of the contract, thus making time for settlement by that date of the essence. No particular form of words is necessary to have that effect. As Professor Carter states in paragraph [30-50]:

> An express agreement to make time of the essence may be stated in other ways than saying, "Time is of essence." For example, by a term stating that any failure to perform at the time appointed is a repudiation or fundamental breach of the contract.

[38] A threat to sue for damages for breach of contract is clearly such a term. But even if time is not of the essence, failure to comply with a notice stipulating a reasonable time for performance is, of course, evidence that may support an inference of repudiation by a party failing to comply with that obligation. See *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 621, at 644 and 652.

[39] 18 December 2021 was nearly two months after the agreement had been made: an agreement that the parties clearly intended would be completed promptly, particularly having regard to their longstanding dispute and negotiations. The respondent's failure to complete by that date was, I consider, a breach of the agreement. Additionally, the respondent indicated an intention no longer to be bound by the agreement. While its refusal to settle was, in part, on the incorrect basis that there was no contract, it also sought to change the terms of the agreement by, for example, making completion subject to finance, not providing a settlement deed as required and, of course, refusing to settle.

[40] I find that the respondent has breached the contract that was formed by the exchange of the emails. The applicant has not terminated the contract for the respondent's breach. Even as late as 3 February this year it gave the respondent a further seven days to "reconsider its position." The applicant does not seek specific performance of the contract in this application, but simply declarations that the contract was formed and the respondent has breached it. As I have said, I will make declarations to that effect.

[41] The applicant also seeks an order that the respondent pay damages to be assessed and directions for the matter to proceed to an assessment. No doubt the extent of any loss will be affected by whether the respondent will now complete the contract or will continue to refuse to do so. It does seem into me in the circumstances that judgment for damages to be assessed is appropriate and I will therefore make such an order.

[42] I will hear from the parties about the appropriate directions toward assessment of damages and costs.