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Deed I do...if signed and delivered: 400 George Street (Qld) Pty Limited v BG International Limited

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Abstract

The Queensland Court of Appeal decision in 400 George Street (Qld) Pty Limited v BG International Limited¹ (400 George Street) provides a timely reminder to lawyers of the important differences between deeds and other legal instruments. This case note outlines the key characteristics of deeds, discusses how those key characteristics were considered in the 400 George Street litigation and also provides lessons for lawyers to consider when drafting deeds and advising clients on the proper use of deeds.

Keywords

deeds, 400 George Street (Qld) Pty Limited

CASE NOTE

DEED I DO... IF SIGNED AND DELIVERED: 400 GEORGE STREET (QLD) PTY LIMITED V BG INTERNATIONAL LIMITED

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ABSTRACT

The Queensland Court of Appeal decision in 400 George Street (Qld) Pty Limited v BG International Limited¹ (400 George Street) provides a timely reminder to lawyers of the important differences between deeds and other legal instruments. This case note outlines the key characteristics of deeds, discusses how those key characteristics were considered in the 400 George Street litigation and also provides lessons for lawyers to consider when drafting deeds and advising clients on the proper use of deeds.

I WHAT IS A DEED?

A deed is a form of written legal instrument designed to effect the transfer of a legal interest, right or property (transfer), create a binding obligation on a person or persons (obligation), or to affirm a prior act where a legal interest or right has already been created or property has passed (affirmation). A deed between two or more persons with different interests is called an 'indenture' while a deed by one person or by more than one person with the same interest, such as where one or more persons grant a power of attorney or where a person adopts a new name, is called a 'deed poll'².

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¹ *400 George Street (Qld) Pty Limited v BG International Limited* [2010] QCA 245 (10 September 2010) (Queensland Court of Appeal - Muir and Fraser JJA and Mullins J) on appeal from *400 George Street (Qld) Pty Limited v BG International Limited* [2010] QSC 66 (16 March 2010) (McMurdo J). The appellants sought special leave but it was refused by the High Court of Australia: see *400 George Street (Qld) Pty Limited & Anor v BG International & Ors* [2011] HCATrans 122 (13 May 2011).

² On deeds generally see McDonald R and McGill D *Drafting* (LexisNexis Butterworths, Second Edition, 2008) (McDonald & McGill) Chapter 2. Historically deeds between parties were called an indenture as they were handwritten twice in two columns and then separated by an indented cut, see McDonald & McGill at [2.6].

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A deed is the most solemn form of legal instrument a person can make, hence the common law imposes special requirements with respect to the form, execution and delivery of deeds. Some of the common law rules regarding deeds have been modified by statute in each state or territory³, such that, an appreciation of both the common law rules and each statutory scheme is required to ascertain all requirements for a valid deed in each state or territory. As the 400 George Street decisions considered the laws in Queensland, this article focuses primarily on the law applicable to deeds in Queensland. However, the decision provides a timely reminder to lawyers in other jurisdictions of the importance of knowing the common law rules applicable to deeds and the statutory modification of them in each jurisdiction.

II DEEDS – KEY CHARACTERISTICS

Deeds had significantly more importance at common law as at common law a person's writing had to be authenticated by his or her seal. Hence at common law sealing any written instrument was an essential requirement and therefore at common law all written instruments were required to be deeds. A key intervention of the statutory schemes is to dispense with the need for sealing, provided the deed is signed or marked with a person's mark. As such, it is now uncommon to see a seal used by a natural person or corporation on written instruments, although a seal may still be used in addition to signature.

Deeds as compared to other legal instruments have the following key characteristics:

1. **A deed must be in writing:** at common law a legally binding agreement, such as a contract, does not need to be in writing. However, a deed must be in writing, as at common law it had to be sealed and now at minimum under the statutory schemes it must be signed or marked with a person's mark.⁴

³ The statutory schemes in each state or territory are not based on uniform legislation and therefore not the same, however all states and territories have modified the common law rules applicable to deeds. See Part 2.3, Division 2.3.1 (ss 219 – 222) *Civil Law (Property) Act 2006* (ACT); Part 3 (ss 38-51A) *Conveyancing Act 1919* (NSW); Part 6, Division 1 (ss 46-54) *Law of Property Act* (NT); Part 6; Division 1 (ss 44 – 53) *Property Law Act 1974* (Qld); s 41 *Law of Property Act 1936* (SA); Part XI, Division 1 (ss 59-70) *Conveyancing and Law of Property Act 1884* (Tas); Part II, Division 2 *Property Law Act 1958* (Vic); Part II (ss 8-16) *Property Law Act 1969* (WA).

⁴ s 45 (1) *Property Law Act 1974* (Qld).

2. **A deed must be signed:** legislation has dispensed with the need for deeds to be sealed, provided the deed is signed ('aka' executed)⁵. A deed must be signed and may also be marked by an individual's mark ('ie' sealed)⁶. If signed by an individual, a deed must be witnessed by one person not a party to the deed⁷. If signed by an Australian company, a deed must, at minimum, be signed by a director (if a sole director company) or two or more directors or a director and company secretary.⁸ A deed by a company may also be sealed with any company seal, but sealing is not an essential requirement for valid execution.
3. **Signing alone is insufficient, a deed must also be 'delivered'**⁹: 'Delivery' means that the maker of the deed, by words or conduct, intends to be legally bound immediately or intends to be bound

⁵ s 45 (2) Property Law Act 1974 (Qld).

⁶ s 45 (1) Property Law Act 1974 (Qld).

⁷ s 45 (2) Property Law Act 1974 (Qld).

⁸ s 127 *Corporations Act 2001* (Cth). State legislation provides separate rules for proving execution of a deed by a corporation under the laws of each state. Generally, if a deed is signed by a corporation that is not a company incorporated under the *Corporations Act* (as defined in s 9 the *Corporations Act* (Cth)) a practitioner should look seek advice under law of the jurisdiction where the corporation is incorporated to confirm the corporation has executed the instrument validly under that law. In Queensland, s 46 (6) of the *Property Law Act 1974* (Qld) is expansive, recognising that valid execution of a deed other than by the manner prescribed in s 46 is effectual, such as to recognise execution under a deed in a foreign jurisdiction.

⁹ s 47 (1)(2) and (3) *Property Law Act 1974* (Qld). The common law rule regarding delivery also still applies in the Australian Capital Territory, New South Wales, Victoria and Tasmania as each statutory scheme in those jurisdictions is silent on the requirement for delivery. In South Australia, s 41 (3) of the *Law of Property Act 1936* (SA) provides that "[d]elivery and indenting are not necessary in any case" however the *Law of Property Act 1936* (SA) also provides in s 41 (1)(5) that for other than natural persons a deed expressed to be "signed and delivered" is a deed, suggesting delivery is still required for deeds executed by corporations in South Australia. In the authors view, delivery is not an essential requirement for natural persons or corporations in South Australia provided the other elements in s. 41 indicative of a deed or intention the instrument is a deed are present. In Western Australia, while s 9 (3) of the *Property Law Act 1969* (WA) provides that "[f]ormal delivery and indenting are not necessary in any case" (emphasis supplied), it has been held that this merely confirms the common law rule that no particular words or conduct are necessary to amount to delivery, hence in Western Australia delivery is still required: see *Scook v Premier Building Solutions Pty Ltd* [2003] WASCA 263 (5 November 2003) ; (2003) 28 WAR 124 per Steyler J (McKechnie and Hasluck JJ. agreeing) at [23]-[25].

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immediately but performance is delayed until fulfillment of a condition (called delivery in escrow). Delivery does not mean transfer of possession of the deed. At common law a deed is not effective until it is delivered. In Queensland, execution of the deed itself will not import delivery, hence intention that delivery is to occur must be proven either by the use of words in the deed itself indicating execution and delivery are concurrent (i.e. using the words 'SIGNED AND DELIVERED' in the execution clause), or by using separate correspondence or evidence of conduct to confirm delivery has occurred.

4. **Deeds are binding immediately on the maker:** once signed *and* delivered (whether immediately or in escrow), a deed is binding on the maker even if not handed to each other party to the deed and even though each other party to the deed is yet to execute and deliver it. This is compared to contracts where a party can withdraw prior to each other party agreeing.
5. **Deeds are subject to a longer limitation period:** generally instruments signed as deeds create a 'specialty' (such as a contract signed under seal or specialty debt). Court actions based on a specialty have a limitation period of 12 years as opposed to the normal limitation period of 6 years.¹⁰
6. **Deeds have a special form and content:** deeds have a form and content indicating they are deeds and distinguishing them from other legal instruments. Usual indicia of a deed include:
 - describing the instrument as a deed or other transaction (such as a mortgage) intended to have effect as a deed.¹¹ An example is using the words 'This Deed' in the commencement to the instrument;
 - using the language of deeds, such as describing obligations as 'covenants';
 - including the words 'Executed as a Deed' on the signing page;
 - including in the execution clause the words 'Signed, Sealed and Delivered'; and
 - including a date for the deed and actually dating the deed on execution.

¹⁰ s 10 (3) *Limitation of Actions Act 1974* (Qld).

¹¹ s 44 (2) *Property Law Act 1974* (Qld). For a discussion of the formalities see McDonald & McGill, n 2, at [2.10] ff.

III WHEN ARE DEEDS REQUIRED?

An instrument is required to be in the form of a deed when required to be a deed under common law or by legislation. However, legislation has removed the common law requirement for most legal instruments to be signed as deeds. For example, in Queensland agreements under the torrens title system such as property transfers or leases are not required to be deeds¹² nor are powers of attorney required to be deeds.¹³

As such, deeds are normally only required to be used for legal instruments where consideration is absent¹⁴, for example, a deed of release, or to overcome any privity problems (such as where a beneficiary of an obligation is a third party to an agreement).¹⁵

IV 400 GEORGE STREET LITIGATION

In the 400 George Street litigation the respondent proposed lessee signed an 'Agreement for Lease'¹⁶ and Lease (to be held in escrow pending completion of the building) that included the words 'Executed as a Deed' and 'Signed, Sealed and Delivered' in the execution clause. The lessee signed the Agreement for Lease and it was then sent to the appellant lessors (who comprised four parties, one of whom was an overseas corporation) to be signed. Prior to the lessee receiving notice that the overseas corporation had signed the Agreement for Lease, the proposed lessee notified the lessors it was withdrawing from the Agreement for Lease and Lease.

The lessor parties sued, arguing that the Agreement for Lease was a deed and therefore upon signing of the Agreement for Lease the lessee was bound and could not withdraw (see key characteristic 4 above). However, the Supreme Court of

¹² s 161 Land Title Act 1994 (Qld).

¹³ s 12 Powers of Attorney Act 1998 (Qld).

¹⁴ Seddon N C, R A Bigwood and Ellinghaus M P *Cheshire and Fifoot's Law of Contract* (LexisNexis Butterworths, 10th Australian Edition, 2012) (Cheshire & Fifoot) at [4.1] ff . Consideration is the mutual exchange of promises, such as performance of an obligation by party A in exchange for payment of money by party B.

¹⁵ Ibid at [7.1].

¹⁶ An Agreement for Lease is a short form legal instrument whereby a lessee and lessor agree to lease a property subject to a longer and more formal lease being prepared, for example, an agreement for lease may be used before a building is completed and its lettable gross floor area is known; see [2010] QCA 245 (10 September 2010) per Muir J (Fraser JA and Mullins J agreeing) at [40].

Queensland and the Queensland Court of Appeal each held that the Agreement for Lease was not binding on the lessee and as such the lessee could withdraw.

A Background

Significant to the outcome of the proceedings, prior to execution of the Agreement for Lease and the Lease, the lessee added to a document titled 'letter of offer' dated 23 April 2008 (April 2008 letter) the following:

*"37 No legally binding agreement is made by the parties" execution of this letter. All documentation is **subject to a mutually agreed legal document** by both parties.*

38 Exclusivity

In consideration of the Lessee entering into this agreement, the Lessor agrees with the Lessee that the Lessor will not negotiate or enter into any agreement with any person in relation to the lease or occupation of the Premises from the date of this agreement until the earlier of:

- (a) 31 May 2008; and*
 - (b) the Lessee withdraws from negotiations with the Lessor; and*
 - (c) execution of a formal agreement for lease between the Lessor and the Lessee for the lease of the premises.*
-' (emphasis supplied)*

Over the next five months the parties negotiated the terms of the Agreement for Lease and the Lease. The lessee executed the Agreement for Lease and Lease on October 8, 2008. All of the lessors had executed the agreement by November 27, 2008, however, before execution and delivery (and therefore acceptance) was communicated to the lessee by all of the lessors, the lessee provided notice on November 27, 2008 withdrawing from the lease.

The lessors sued arguing the lessee was bound. Whether the lessee was bound or not depended upon whether the Agreement for Lease was a binding deed or not. If a binding deed the lessee could not withdraw, if not a deed (and therefore a contract) or not a binding deed then the lessee could withdraw.

B Execution of the Agreement for Lease

The primary Judge, McMurdo J, held, amongst other things, that the Agreement for Lease was not a deed¹⁷ (and therefore was a contract) and that each party did not

¹⁷ [2010] QSC 66 (16 March 2010) (McMurdo J) at [56] and [65].

intend to be bound until all parties were bound¹⁸. Therefore the respondent lessee could and did validly withdraw from the lease. This finding was on the basis that the Agreement for Lease had the usual indicia of a bare contract and not a deed, such as a reference to consideration and the respondent lessee had not dated the Agreement to Lease when it signed it. It had also indicated in correspondence (April 2008 letter) that it intended to only be bound contemporaneously with the other parties.

On Appeal, Muir JA (with whom Fraser JA and Mullins J agreed) departed from the primary judge's findings regarding whether the Agreement for Lease was a deed or not. The Queensland Court of Appeal found that the agreement was *signed* ('ie' executed) as a deed, and therefore was a deed, but that it was not a binding deed as the conditions for delivery were not satisfied before the time the lessee withdrew.

After discussing the usual indicia of a deed (which were present), such as the phrase 'Executed as a deed' on the signing page and 'Signed, Sealed and Delivered' in the execution clause, Muir JA found:

[35] It is unlikely, I think, that, subject to the matters discussed later, a reasonable person in the position of the respondent [Lessee], having perused the Instrument [Agreement for Lease], would not understand from these words that the contractual intention was that the Instrument be a deed.

....

[39] I acknowledge the force of the primary judge's careful reasoning in this regard but, with respect, I am unable to accept that the clear election of the respondent to execute the Instrument as a deed, manifested in the words "Executed as a deed" and "By executing this deed", are overwhelmed by the matters referred to by the primary judge and the additional considerations relied on by counsel for the respondent. Those words are not merely general indicia of an intention that the Instrument be a deed: they unequivocally express that intention.....'

C Delivery of the Agreement for Lease

Crucially, the Queensland Court of Appeal found that while the Agreement for Lease was executed as a deed, the Agreement for Lease was not delivered (see key characteristic 3 above), hence the deed was not binding. On this issue Muir JA stated:

[52] It is clear from s 47(1) of the Property Law Act that execution of an instrument in the form of a deed will not, necessarily, import delivery. For the execution of a document to import delivery **it must appear that execution was**

¹⁸ [2010] QSC 66 (16 March 2010) (McMurdo J) at [61].

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intended to constitute delivery. Both under the Section and the Common Law, the intention of the executing party is the critical matter.

[53] In my view, cl 37 of the April 2008 letter, when construed with cl 38, signified an understanding that the parties would not be bound until such time as their bargain was recorded in a formal document agreed by all parties. No doubt that was the intention at the date of the letter but the point of the clauses was to state the basis on which the parties would conduct their negotiations....

[54] The Instrument [Agreement for Lease] and the Lease were not the "mutually agreed legal document" referred to in cl 37. "Mutually agreed" means just that. The words are not referable to an instrument binding on one party but not on the others." (Citations Omitted and Emphasis Supplied)

Therefore, based on the Queensland Court of Appeal's findings, even though the Agreement for Lease had the form of, and was signed as, a deed, the lessee had not 'delivered' the deed (in a legal sense) because the lessee had by correspondence and conduct indicated it did not intend to be bound until 'mutual agreement' of the Agreement for Lease by the lessee and each of the lessors.

V LESSONS

The 400 George Street litigation provides some valuable lessons for lawyers including:

- in most cases a deed is not required for an instrument to be legally binding. Deeds should only be used as an exception rather than a rule. The Agreement for Lease and Lease in the 400 George Street litigation were not required to be deeds;
- any draftsperson should be conscious of when a deed is or may be required. This may be because legislation requires a deed, or more commonly where there may be an absence of consideration or a privity problem;
- if a deed is required, to be effective the deed should be drafted properly as a deed (such all the indicia of a deed such as using 'this deed', 'executed as a deed', 'covenant' etc.), signed as a deed in accordance with legislative requirements and delivered properly in accordance with the legal requirements for delivery;
- there are important differences between deeds and other legal instruments such as contracts. Vernacular used in contracts, such as 'consideration', 'mutual exchange of promises' or 'agreement', should not be used in

deeds. A contract should not be changed into a deed merely by changing the execution clause;

- for a deed to be binding on a party it must be both signed ('ie' executed) *and* delivered by that party. Delivery should not be assumed merely because the deed has been executed;
- clients should be advised of the important differences between, and the consequences of entering into, a deed compared to a mere agreement. One consequence is that they may be bound without any other parties being bound if the deed is delivered at the time of execution. Another important consequence is that a longer limitation period applies;
- unless it is clearly intended delivery is to occur at the same time as signing, the parties should clearly provide in the deed how and when delivery is to occur, or, if not in the deed, the parties should make that clear by correspondence what conditions are required to be satisfied to effect delivery and how they will be satisfied;
- if it is not intended the deed is to be delivered immediately on execution, the execution clause should not state that the deed is 'Signed, Sealed and Delivered', rather, the Deed should state it is 'Signed' only. This is so as to not import (and to displace) any presumption that execution also constitutes delivery;
- a deed signed but delivered only upon the happening of a conditional event (i.e. a deed subject to conditional delivery) (as per the Agreement to Lease in the 400 George Street litigation) is not the same as a deed delivered in escrow. Under escrow a binding deed is formed on execution and delivery but performance is delayed, whereas conditional delivery delays the formation of the deed itself, hence there is no binding deed until the event constituting delivery occurs.¹⁹

¹⁹ For a discussion of the critical distinction between delayed agreement and delayed performance, in the contractual context, see Chesire & Fifoot, n 14, at [5.21] – [5.25].