

TO BIND OR NOT TO BIND?

IMMEDIATELY ENFORCEABLE AGREEMENT TO LEASE?

The Supreme Court of Victoria in [Casdar Pty Ltd v Fanous \[2017\] VSC 616 \(20 October 2017\)](#) has confirmed that merely calling an agreement a “Heads of Agreement” and having it signed does not automatically bind the parties immediately to a legally enforceable agreement.

The same principles of determining whether an agreement is binding on a party apply to other documents variously called “Memorandum of Understanding”, “Offers to Purchase”, “Summary of Terms”, “Terms Sheet” and other expressions.

This case was an appeal from a Victorian Civil and Administrative Tribunal (“VCAT”) decision in [Casdar Pty Ltd v Fanous \(Building and Property\) \[2017\] VCAT 1464 \(12 September 2017\)](#). In Victoria, an appeal from VCAT, must first receive leave (or “consent”) from the Supreme Court and if received then be heard. [see our Article [An appeal from VCAT to the Victorian Supreme Court is not automatic](#)]

In short, in the Supreme Court, Croft J decided:-

“.....leave to appeal is refused, but if leave had been granted, the appeal would be dismissed with costs.”

Casdar Pty Ltd as Lessor (“Casdar”) and Mr Joseph Fanous as Lessee (“Fanous”) signed a Heads of Agreement on 29 July 2015 (“HoA”). The HoA provided, amongst other things, for an Agreement to Lease a commercial shop for the purpose of an Egyptian style restaurant and included the following:-

“SPECIAL CONDITIONS TO THE AGREEMENT FOR LEASE

- 1. The shop already has a planning permit in place for a restaurant. The Lessee should apply immediately for any approval from Council after signing hereof.*
- 2. The Lessor, its associates, and subsidiaries covenant that the Permitted Use shall be sole and exclusive to the Lessee at 51-53 Heatherton Road Endeavour Hills (Centre) and within 5 km of the Centre.*

3. *Agreement for Lease and Lease subject to lessee's lawyer's final approval within 7 days after the Lessor provides the Heads of Agreement Lessee [sic].*
4. *The Lessor is responsible for and agrees to pay all costs for the completion and installation of Fittings & Fixture to the facility including:*

..."

After signing the HoA by both Casdar and Fanous, Fanous obtained financial approval, paid the first month's rent on or about 28 August 2015, collected the keys but never took possession.

Casdar commenced building works in anticipation of occupation by Fanous.

However, despite commencing negotiations for a formal lease on or about 4 August 2015, negotiations broke down. Unsurprisingly, Casdar asserted that the HoA was an immediately concluded and binding agreement. Arguing, amongst other things, that no Lessor would commence building works without a binding commitment from a Lessee.

In response, Fanous argued that the HoA was subject to a formal lease and as no such lease had been concluded the HoA was not binding. In any event, Fanous argued that the building works by Casdar were only general in nature.

Accordingly, the Court had to determine whether the HoA was an agreement to lease by which the parties intended to be immediately bound.

The Court concluded that the parties did not intend the HoA to be immediately binding. The Court observed that the expression "Heads of Agreement" was not, of itself, determinative of the issue. The Court referred to the leading High Court Authority of [*Masters v Cameron \[1954\] HCA 72; \(1954\) 91 CLR 353 \(30 November 1954\)*](#) and reconfirmed that the most important factor was the intention of the parties.

In order to ascertain the intention of the parties "*regard must be had to any written agreement between the parties and the pre and post contractual conduct of the parties*" on the basis of what a reasonable person would conclude from all the dealings between the parties.

The Court observed that the requirements of the Retail Leases Act (Vic) were not satisfied. A Lessor is required to provide certain information including a disclosure statement to the Lessee before entering into a binding lease. The Court considered this to be indicative that no immediately binding contract was concluded upon signing the HoA.

Further, the actual words of the HoA supported the view that no immediately binding agreement had been concluded. Finally, the Court accepted that the works undertaken by the Lessor were general in nature.

General implications

It is trite, yet important to state, that if you intend an agreement to be immediately binding then it should clearly say so. On the other hand, if you intend not to be bound by such a document, you should clearly say so. Always be mindful that a third party who benefits from the transaction (such as a commission agent) may be encouraging you to sign for reasons contrary to your caution and prudence.

Date Published: 8 February 2018

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