

TO BIND OR NOT TO BIND? ENFORCEABLE “OFFER TO PURCHASE”

In our article in February 2018, [To bind or not to bind? Immediately enforceable agreement to lease?](#), we noted that 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.

However, the Supreme Court of Victoria in [Verrocchi v Messinis \[2016\] VSC 490](#) is an example of where a document headed “Offer to Purchase Melbourne City Pharmacy” was held to be binding for the purchase of a pharmacy. The case is an interesting contrast to the Casdar case.

The details provided in the current case is a not uncommon means of proceeding in the retail pharmacy industry. Notably, the front page of the document included a description of the business and the business premises, together with the names of the Vendor and his Solicitor and Agent and the name of the Purchaser and his Solicitor. Also, on the front page of the document it was stated “*status of this Offer: this Offer is intended to be legally binding upon the Vendor and the Purchaser*”.

The Offer document noted details such as the purchase price (\$1.4m), settlement date and payment details. However, there was a condition precedent to settlement which provided:-

“Conditions Precedent to Settlement:

This Offer is subject to:

1. *The Purchaser completing due diligence investigations into the Business to its satisfaction within 5 days of receipt of all requested information (Inquiry Period). The Purchaser agrees to submit the complete request for information in writing no later than 3 business days after acceptance of this offer; and [sic]*

Formal Contract of Sale:

Upon acceptance of this Offer, the Purchaser and Vendor agree that they will as soon as practicable negotiate and execute a formal Contract of Sale of Business prepared by the Vendor’s lawyers. The Contract of Sale will contain all of the general terms and conditions as those usually

included in a Victorian Standard Contract for Sale of Business (with any state-specific legislative references updated to reflect those of the State in which the Business is situated) plus further conditions precedent and special conditions relating to the sale of the Business as set out in principle below:

- 1. Issue to the Purchaser on Settlement Date of a new Medicare Pharmaceutical Benefits Scheme ("PBS") Approval Number by Medicare Australia for use in conduct of the Business, contemporaneously with the cancellation of the Vendor's current PBS Approval Number – this will be a condition precedent; and*
- 2. All necessary approvals being granted to the Purchaser by the Pharmacy Council or Authority in the State in which the Business is situated to enable the Purchaser to conduct the Business at the Premises from the Settlement Date – this will be a condition precedent;*
- 3. The Landlord of the Business Premises consenting to the transfer of the existing Business Premises Lease to the Purchaser – this will be a condition precedent;*
- 4. A valuation of stock being carried out at the close of business after the last trading day prior to the Settlement Date by a reputable independent stocktaker ("Independent Stocktaker") in accordance with stock valuation procedures and terms as per standard industry practice (eg. all stock with an expiry date of less than three (3) months to be excluded) with the Independent Stocktaker's costs to be shared equally between the Vendor and the Purchaser noting that if the stock valuation exceeds the maximum stock value the Independent Stocktaker will determine which stock is to be excluded where the Vendor and Purchaser cannot so agree;*
- 5. Transfer to the Purchaser at Settlement of:*
 - a. all records, computer files, software and passwords, telephone and facsimile numbers, email addresses, websites, security alarm codes and all other usual services currently used or connected to the business;*
 - b. all fixtures, fittings and equipment owned by the Vendor and used in the Business;*
 - c. any applicable banner group or similar franchise agreement relating to the Business Premises;*
- 6. Termination by the Vendor of all of its employees on the Settlement Date and re-employment of current employees as selected by the Purchaser. The Vendor must allow adjustments to the Purchase Price for the tax-affected monetary value of annual leave and long service*

leave of those employees transferring to their present entitlements at Settlement to the Purchaser;

- 7. The Vendor and Purchaser agreeing that the sale of the Business constitutes the sale of a “going concern” for GST purposes.”*

There were various exchanges between the Vendor and the Purchaser in relation to progressing the sale.

The Court stated:-

“24 The issue for determination is whether the plaintiffs [Purchaser] have established that the parties intended, by the execution of the alleged contract, to enter into a legally binding agreement for the sale of the pharmacy business. The defendant [Vendor] accepted that the parties had expressly stated that the alleged contract was ‘intended to be legally binding upon the Vendor and the Purchaser’ but contended that what was in fact intended to be binding was an agreement to negotiate a formal contract of sale of business.”

In other words, the Defendant was looking to argue that it was not bound by the agreement and therefore not required to sell the pharmacy business.

The Plaintiff, in short, argued that a sufficiently certain agreement had been concluded with essential details and therefore was binding on both parties.

To the extent that there was an unusual feature in this case that the Defendant conceded that by the execution of the alleged contract, the parties did intend to enter into a legally binding contract. The Court noted “this concession is not surprising because the terms of the document state that “This Offer is intended to be legally binding upon the Vendor and the Purchaser; and each party signed the contract as “executed as an agreement””.

The facts of this case provide an interesting contrast to the Casdar case but are remarkably consistent with such agreements in the sale of pharmacy businesses. It may also be not uncommon that it is suggested to Vendors that “they can get out of the contract” because it is subject to “formal contract”.

The lesson for all Vendors and Purchasers is quite simply the greater the detail in an agreement that is headed “Offer to Purchase”, “Heads of Agreement”, “Terms Sheet” or some other such description, the more likely that it is to be binding. Extreme caution should be exercised in these circumstances and the advice of a selling agent should not necessarily be relied upon. These sales are typically of a significant scale and of considerable importance.

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